Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE VAN VOORHIS, JUDGE OF THE SUPERIOR COURT OF CONTRA COSTA COUNTY,

Petitioner,

v.

COMMISSION ON JUDICIAL PERFORMANCE,

Respondent.

On Petition for Writ of Certiorari
To the California Supreme Court No. S116146
Commission on Judicial Performance Inquiry No. 165

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the California Commission on Judicial Performance's decision removing Superior Court Judge Bruce Van Voorhis violated Judge Van Voorhis' procedural due process rights under the 14th Amendment of the United States Constitution?

2. Whether the California Commission on Judicial Performance's refusal to permit a separate dispositional hearing and an opportunity for Judge Van Voorhis to present dispositional evidence violated Judge Van Voorhis' due process rights under the 14th Amendment of the United States Constitution?

II. PARTIES TO THE PROCEEDING

1. California Commission on Judicial Performance

The California Commission on Judicial Performance (hereafter "commission") was established in California by voter referendum in the November 1960 election. The commission is responsible for the investigation of complaints of judicial misconduct and incapacity and for the discipline of judges, former judges and court commissioners and referees. The commission's authority is limited to investigation and discipline of judicial misconduct, which usually involves conduct in conflict with the Code of Judicial Ethics. The commission's authority is set forth in article VI, sections 8, 18, 18.1 and 18.5 of the California Constitution. The commission has the authority to discipline or remove a judge subject to review by the California Supreme Court. (Cal. Const., art VI, sec. 8, 18.) Article VI, section 18(i) of the California Constitution authorizes the commission to make rules for conducting investigations and formal proceedings. There rules are found in the commission rules 101 through 138 which were adopted by the commission on October 24, 1996, and took effect December 1, 1996.

Pursuant to the California Constitution, article VI, section 8, the commission is composed of eleven members: one justice of a court of appeal and two trial court judges, all appointed by the Supreme Court; two attorneys appointed by the Governor; and six lay citizens, two appointed by the Governor, two appointed by the Senate Committee on Rules and two appointed by the Speaker of the Assembly. The Chairperson is the Honorable Rise Jones Pichon of the Santa Clara Superior Court in San Jose.

2. Bruce Van Voorhis

Bruce Van Voorhis was elected as a judge of the Contra Costa Municipal Court in California and took office on January 5, 1987. On June 8, 1998, Judge Van Voorhis was elevated to the Contra Costa County Superior Court as a result of the consolidation of the courts. Judge Van Voorhis served as a superior court judge from that time until February 27th, 2003, when the California Commission on Judicial Performance issued its decision and order removing Judge Van Voorhis from office.

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V. BASIS FOR JURISDICTION

The California Supreme Court denied Judge Van Voorhis' Petition for Review on September 10th, 2003. The United States Supreme Court has jurisdiction to review the denial of the petition pursuant to 28 USC section 1257.

VI. CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV, § 1.

VII. STATEMENT OF THE CASE

In May 2001, the commission sent a preliminary investigation letter to Judge Van Voorhis. Following Judge Van Voorhis' response, a Notice of Formal Proceedings was filed by the Commission on December 17th, 2001. Judge Van Voorhis then filed his verified answer on January 2nd, 2002.

On January 25th, 2002, at the request of the commission, the California Supreme Court appointed three special masters to hear the matter: Justice Thomas Hollenhorst of the Court of Appeal, Fourth Appellate District, presiding; Justice Kenneth Yegan of the Court of Appeal, Second Appellate District; and Judge Thompson Hanks of the Superior Court of Riverside County.

The evidentiary hearing pursuant to commission rule 121 was held before the three special masters from June 24th through June 27th, 2002. At the time of the evidentiary hearing, commission rule 134 required that "[t]he affirmative vote of six members of the commission who have considered the record and report of the masters and who were present at any oral hearing as provided in rule 121 . . . is required for . . . removal of a judge . . . ." Rules of the Commission on Judicial Performance, rule 134; Emphasis added. None of the eleven members of the commission attended Judge Van Voorhis' rule 121 oral hearing before the three appointed special masters.

On September 6th, 2002, the special masters submitted their findings of fact and conclusions of law to the commission. The matter was then briefed and argued pursuant to commission rule 132 before ten of the eleven

members of the commission on December 4th, 2002.[1] Immediately after the oral argument, the commission members retired to deliberate. On February 27th, 2003, the commission issued its written decision and order removing Judge Van Voorhis from office. The commission vote was 8-2 in favor of removal.[2] On March 3rd, 2003, Judge Van Voorhis then made a request to the commission to submit additional evidence relevant to the issue of whether removal was an appropriate sanction. This request was denied.

In his subsequent petition for review of the commission's decision before the California Supreme Court, Judge Van Voorhis argued, among other things, that the removal order violated his procedural due process rights because the eight commission members who voted to remove Judge Van Voorhis did not attend the rule 121 hearing before the Masters. The California Supreme Court denied Judge Van Voorhis' petition for review without explanation on September 10th, 2003.

Judge Van Voorhis first raised the constitutional issues that are now presented to this Court in the California Supreme Court. However, as a practical matter, it should

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[1] Rule 132 provides: "Upon receipt of the masters' report and any objections, the commission shall give the judge and the examiner an opportunity to be heard orally before the commission, and written notice of the time and place of such hearing shall be mailed to the judge, at least 10 days prior thereto." (Rules of the Commission on Judicial Performance, rule 132.)

[2] Commission rule 134 was amended on January 29th, 2003. The amendment changed the requirement that six members of the commission attend the rule 121 hearing. Instead, a commission member was entitled to vote if he or she was present at the rule 132 hearing. Ten of the eleven Commission members did in fact attend the rule 132 hearing.

be noted that the issue of whether the commission complied with rule 134 does not arise until the commission members actually vote. Thus, the first opportunity for Judge Van Voorhis to raise this issue was with the California Supreme Court after the commission rendered its decision on February 27th, 2003.

VIII. LEGAL ARGUMENT

The Due Process Clause prohibits governmental deprivation of an individual's life, liberty, or property without due process of law. To determine whether governmental action affecting an individual's interest is violative of this provision, the first step in the analysis is to inquire whether the nature of the interest is within the contemplation of the Constitution's "liberty or property" language. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). A protectible liberty interest may arise from two sources -- the Due Process Clause itself or the laws of the states. Hewitt v. Helms, 459 U.S. 460, 466 (1983).

The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in "liberty" or "property." Matthews v. Eldridge, 424 U.S. 319, 332 (1976). After finding the deprivation of a protected interest, the next step is to determine whether the State's procedures comport with due process. Id. at p. 332.

In Matthews v. Eldridge, 424 U.S. at p. 335, this Court detailed the factors to be considered when there is a claim that an administrative procedure which affects private interests denies due process. Those are: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

California state law defines what is property in this matter. See, Board of Regents of State Colleges v. Roth, 408 U.S. 564, 579 (1972). Here, Judge Van Voorhis has a property interest in his continued employment as a superior court judge in Contra Costa County. The property interest arises from the California State Constitution, Article VI, section 18 and the Rules of the Commission on Judicial Performance. These rules, in particular commission rule 134, guarantee a judge certain procedural safeguards before the State of California can discipline or remove a judge for alleged misconduct.

One such procedural safeguard required the attendance of the commission members who intended to vote on the disposition of a judge at the rule 121 oral hearing before the appointed special masters. Until its amendment on January 29th, 2003, commission rule 134 provided:

> The commission may privately or publicly admonish, censure, remove or retire a judge, or find a person unfit to serve as a subordinate judicial officer. The affirmative vote of six members of the commission who have considered the record and report of the masters and who were present at any oral hearing as provided in rule 121 or, when the hearing was before the commission without masters, of six members of the commission who have considered the record, and at least four of whom were present when the evidence was produced, is required for a private or public admonishment, censure, removal or retirement of a judge, or a

finding that a person is unfit to serve as a subordinate judicial officer, or for dismissal of the proceedings. (Emphasis added.)

This version of rule 134 was in effect at the time of Judge Van Voorhis' rule 121 hearing and its requirements are mandatory. In order to vote upon the disposition of Judge Van Voorhis, the commission members were required to attend the rule 121 evidentiary hearing. Not one member of the commission attended the rule 121 hearing. The record of the proceedings reflects that commission counsel, counsel for Judge Van Voorhis and Judge Van Voorhis were present, but it does not indicate that any of the commission members were present during any portion of the hearing. Notably, the commission does not dispute that its members failed to attend the evidentiary hearing. (Appendix, at p. 147.)

Because none of the ten commission members who voted on the disposition in this matter attended the evidentiary hearing, the vote did not comply with the mandatory requirements of rule 134 and, as a result, Judge Van Voorhis was deprived of a significant due process right. As a procedural matter, it is fundamentally unfair for the commission to ignore its own rules in reaching a determination that Judge Van Voorhis should be removed. This is especially true in a case with so many disputed issues of fact and where viewing the demeanor of a witness testifying can be crucial to properly evaluating and weighing conflicting testimony.[3]

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[3] This proceeding was procedurally unfair to Judge Van Voorhis in other respects as well. For example, Judge Van Voorhis' March 3rd, 2003, request to the Commission to present dispositional evidence was

Nearly two months after retiring to deliberate over Judge Van Voorhis' fate, the commission amended Rule 134. On January 29th, 2003, rule 134 was amended to allow the commission members to vote without attending the rule 121 evidentiary proceeding before the special masters. Rule 134 now provides that the commission members are only required to attend the subsequent rule 132 oral argument before the commission.

California law provides that: "Due process requires a fair trial before an impartial tribunal. Such a trial requires that the person or body who decides the case must know, consider and appraise the evidence." Vollstedt v. City of Stockton (1990) 220 Cal.App.3d 265, 269. The fundamental principle is that "the one who decides must hear." (Ibid.) While due process does not require the decision maker to necessarily attend the evidentiary hearing, or to consider every page of the record before making a decision, California state law does require compliance with the applicable procedures specified in the statute or ordinance in order for the discharge to be valid. Layton v. Merit System Commission (1976) 60 Cal.App.3d 58, 63.

Here, the commission failed to comply with its own rules in removing Judge Van Voorhis. Apparently, upon recognizing that it failed to comply with rule 134, the commission then amended the rule in an ex post facto attempt to legitimize what was clearly an invalid hearing.

Improper removal of publicly elected officials undermines our democratic system of government if

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denied without explanation. This is discussed below. (Appendix, at pp. 2-5.)

accomplished without compliance with the procedural safeguards set forth in the commission's own rules. A judge cannot be deprived of this significant procedural safeguard after the fact for the sake of convenience because it can affect hearing tactics.

In anticipation of an argument that Judge Van Voorhis waived this objection by failing to object during the rule 121 proceeding, it is respectfully submitted that the requirements of rule 134 cannot be waived. These requirements are jurisdictional. Simply stated, if a commission member wanted to affect the disposition of a particular judge, then that commission member should have been present at the evidentiary hearing. There is no exception to this rule and it is self-executing.

Moreover, an objection by the respondent judge during the proceedings is not feasible. The commission may discipline a judge with only six affirmative votes, so it is not necessarily objectionable for as many as five commission members to ignore the entire evidentiary hearing. Rules of the Commission on Judicial Performance, rule 134. As a practical matter, it would be procedurally awkward to require a judge to make an objection at the outset of the hearing that some, or all, of the commission members are not present and then again after each break in the proceedings. The burden is on the commission members under former Rule 134 to attend the hearing if they wish to affect the disposition. The burden should not be placed on the respondent judge to determine which commission members are in attendance and whether an objection is warranted based on the level of attendance.

A. THE COMMISSION'S INTERPRETATION OF FORMER RULE 134 IS IRRELEVANT BECAUSE RULE 134 IS UNAMBIGUOUS.

The commission argued in its brief to the California Supreme Court that it never interpreted former rule 134 to require the commission members' attendance at the rule 121 hearing and that its interpretation should control.

The commission begins the analysis of its former rule 134 by acknowledging that the "same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies." (Appendix, at p. 147.) The commission then argues that it has always interpreted rule 134 to require the commission members' attendance at the rule 132 hearing, but not the rule 121 hearing and that the reference to rule 121 in former rule 134 was "inadvertent and in error." (Appendix, at p. 146.)

The commission's argument is without merit. Its interpretation of rule 134 and the legislative history of rule 134 are not relevant considerations because rule 134 is not ambiguous. Former rule 134 plainly references rule 121 (and not rule 132) in the text of the rule. Regardless of how the commission interprets rule 134, there is only one reasonable construction of the rule.

Because rule 134 is unambiguous, under California law, there is no need to consider legislative history to interpret the rule.[4] As has been frequently said: "In construing the terms of a statute [the court] resort[s] to the legislative history of the measure only if its terms are

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[4] This is not so much a question of interpretation as it is one of the commission asking the Court to redraft former rule 134 in order to substitute Rule 132 in place of Rule 121.

ambiguous." Title Ins. & Trust Co. v. County of Riverside (1989) 48 Cal.3d 84, 96. An ambiguity arises only if ". . . there [is] more than one construction in issue which is semantically permissible, i.e., more than one usage which makes sense of the statutory language given the context and applicable rules of usage." County of Sutter v. Board of Administration (1989) 215 Cal.App.3d 1288, 1295. Here, multiple constructions of rule 134 are not possible.

To consider extrinsic evidence as urged by the commission in interpreting rule 134 would violate the principle that, when statutory language is clear and unambiguous, there is no need for construction, and courts should not indulge in it." Solberg v. Superior Court (1977) 19 Cal.3d 182, 198. This rule is deeply rooted in American jurisprudence. Sturges v. Crowninshield (1819) 17 U.S. 122, 202.

> In any case involving statutory interpretation, our fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.]" (People v. Murphy (2001) 25 Cal.4th 136, 142.) Where statutory language is clear and unambiguous--i.e., it has only one reasonable construction -- judicial construction is generally unnecessary. (Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 775.)

The commission's argument is very similar to an argument that was advanced and rejected in Planned Parenthood Affiliates v. Swoap (1985) 173 Cal.App.3d 1187. The facts of Planned Parenthood arose from a clerical error in the California State Budget. In 1985-1986, the California State Budget originally contained a section (section 33.35), which restricted the use of family planning funds for organizations providing abortion-related services. The Legislature, by a two-thirds majority, voted to delete the provision, but because of a clerical error, the deletion was never made. The Governor, although requested by the Speaker of the Assembly to correct the bill, signed it, stating that he was opposed to use of public funds for such services. Petitioners, a coalition of family planning organizations and state officers, sought mandamus to compel respondent Secretary of Health and Welfare to refrain from enforcing the section. The Court held that the petition could not be granted on this showing.

The Court clarified that the issue in Planned Parenthood was not one of interpretation to carry out legislative intent. The words of section 33.35 were clear, so extrinsic evidence simply could not be used to nullify the provision as enacted. Planned Parenthood, 173 Cal.App.3d at p. 1193. The Court held that the appropriate remedy for mistakes in budget bills is a "cleanup bill" to correct the errors. Id., at p. 1195; See also, Ceridian Corp. v. Franchise Tax Board (2000) 85 Cal.App.4th 875, 889; Sacramento v. Public Employees' Retirement System (1994) 22 Cal.App.4th 786, 793.

There is a sound justification for not relying upon extrinsic evidence to interpret an unambiguous statute: "If the meaning of a statute can be declared without the support of a statutory text, the law is not made "by" the

statute, it is made by the courts in violation of the Constitution. This does not mean that legislative history may not be brought to bear upon the construction of the statutory text. Its utility, however, is confined to that task. The significance to be accorded extrinsic evidence of legislative intention (or purpose) depends upon its capacity to resolve ambiguities in statutory language . . .." In-Home Supportive Services v. Worker's Comp Appeals Bd. (1984) 152 Cal.App.3d 720, 739.

Rule 134 is unambiguous and the Commission's argument that its interpretation of the statute should instead control is without merit.

1. The Absence Of The Commission Members From The Rule 121 Hearing Is A Jurisdictional Error That Cannot Be Waived.

Before the California Supreme Court, the commission contended that Judge Van Voorhis waived his objection regarding non-compliance with Rule 134 by not raising it first with the commission at either the rule 121 or rule 132 hearings. (Answer, at p. 12.) However, former Rule 134-is a jurisdictional rule and non-compliance cannot be waived. A noncurable defect of substance where the question is one of law, such as lack of jurisdiction, is not waivable. See, Twine v. Compton Supermarket (1986) 179 Cal.App.3d 514, 518 [questions of jurisdiction may be raised for first time on appeal.] Thus, contrary to the Commission's argument the issue of whether the Commission acted in excess of its jurisdiction in violating Rule 134 is not waivable.

As stated by the California Supreme Court in Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, at p. 291:

> The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional. Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari. And, as a practical matter, accuracy in definition is neither common nor necessary."

In Rodman v. Superior Court (1939) 13 Cal.2d 262, the California Supreme Court held that "it seems well settled ... that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction." Rodman, at p. 269. Here, the Commission acted in excess of its

jurisdiction because none of the Commission members who voted to remove Judge Van Voorhis attended the Rule 121 hearing as required by former Rule 134.

2. The Commission's Use Of Amended Rule 134 In Place Of Former Rule 134 Was An Improper Retroactive Application Of The Rule.

In general, the legislature may cure irregularities or omissions to comply with provisions of a statute which could have been omitted in the first instance. Miller v. McKenna (1944) 23 Cal.2d 774, 782. However, the Legislature cannot cure defects which are jurisdictional. Among the jurisdictional requisites are sufficient notice and opportunity for hearing to constitute compliance with due process. Ibid.

As discussed above, the commission acted in excess of its jurisdiction in not attending the Rule 121 hearing and then voting on the disposition of Judge Van Voorhis. While the precise date of the commission vote is not clear, the commission members in fact retired to deliberate on December 4th, 2002 and the amendment to Rule 134 did not occur until January 29th, 2003. Thus, it is extremely unlikely that amended Rule 134 had been enacted at the time of the commission vote in this matter.

Even if amended Rule 134 was in effect at the time of the vote, which is doubtful, the amendment is more than just a procedural change. The commission's non-compliance with former Rule 134 was a jurisdictional defect that cannot be cured by subsequent amendment. Attendance at the Rule 121 hearing was a jurisdictional requirement under former Rule 134. The commission acted

in excess of its jurisdiction in failing to attend the hearing and that defect cannot now be cured by retroactive amendment to the rule.

There were real consequences to Judge Van Voorhis resulting from the commission's failure to attend the Rule 121 hearing. In particular, had the commission attended the Rule 121 hearing, then the members could have personally observed the testimony of several witnesses to Judge Van Voorhis. This testimony was unreasonably rejected by the masters without an evidentiary basis for doing so. Had the commission members been present at the hearing, then they could have observed this testimony firsthand.

B. The Level Of Discipline Imposed Upon A Judge Should Not Be Affected By An Unsuccessful Defense Before The Special Masters.

The Commission identified five considerations that were relevant to the level of discipline imposed in this case. Two of these considerations are: Whether the judge appreciates the inappropriateness of his actions; and, whether the judge is likely to engage in unethical conduct in the future. (See, Appendix, at p. 104.) Both of these considerations are extremely unfair for use as an element in the level of discipline imposed and violate Judge Van Voorhis' due process rights.

First, the commission essentially found that Judge Van Voorhis did not appreciate the inappropriateness of his actions because he offered evidence to defend his conduct. The masters either did not credit this evidence or did not give it much weight. As a fact-finder, that is their role. However, for the commission to then make a finding that

Judge Van Voorhis does not appreciate the nature of his misconduct because he unsuccessfully contested the allegations in the Notice of Formal Proceedings is procedurally unfair. Judge Van Voorhis has a due process right to contest the charges made by the commission and he should not be punished for exercising that right.

Similarly, the commission reasoned that because Judge Van Voorhis contested the charges, that he is not remorseful for his conduct and it is "close to a certainty" that Judge Van Voorhis will reoffend. (Appendix, at p. 117.) The commission then unjustly placed the burden on Judge Van Voorhis to produce "evidence that he appreciates how the Masters and the Commission could find misconduct." (Appendix, at p. 117.) There is no better illustration of the impossible situation in which the commission places a respondent judge. Under this scenario, a respondent judge is required to both deny that the allegation is accurate, and then also produce evidence that he is genuinely remorseful in the event that the Masters eventually resolve factual issues against him. All of this must occur in the same hearing which is incredibly prejudicial to the defense. It is not credible to mount a defense to allegations of misconduct when the commission also expects the judge to produce evidence that he or she appreciates the nature of the misconduct in the same hearing. It is inherently contradictory.

C. Due Process Requires A Dispositional Hearing Prior To The Imposition Of Discipline.

The commission rules do not provide for a mandatory dispositional hearing after a finding of misconduct by the masters relative to the level of discipline

to be imposed. However, the commission rules are clear that the issue of discipline is not before the masters so there was no forum in which Judge Van Voorhis could fairly present evidence bearing on the appropriate level of discipline. See, Rules of the Commission on Judicial Performance, Rule 129(d). In cases where the allegations of misconduct are disputed, dispositional evidence related to the level of discipline to be imposed cannot reasonably be placed before the masters. Not only is such evidence irrelevant because it relates to discipline, but it is extremely prejudicial to the respondent judge's effort to defend against allegations that are contested.

Compounding the problem, there is no mandatory procedure for the commission to hear evidence of an appropriate disposition from the judge. There is a discretionary provision in the rules. (Rules of the Commission on Judicial Performance, Rule 133.) On March 3rd, 2003, Judge Van Voorhis invoked this provision and made a written request to submit additional evidence pursuant to rule 133, but that request was denied without explanation. (Appendix, at pp. 2-5.) This denial is a violation of due process.

Among other things, Judge Van Voorhis intended to offer evidence that he presided over 64 jury trials without incident in the last 18 months and that he was handling things better. (Appendix, at p. 119.) The commission refused to consider this evidence because it was not in the record. For the reasons discussed above, it would be manifestly unfair to have required Judge Van Voorhis to submit this evidence during the hearing before the masters because it is in effect a concession that the allegations are true, which was disputed in important respects. If dispositional evidence must be presented initially before

the special masters, it makes it very difficult for a judge to realistically confine character evidence when litigating the charges.

For example, in a criminal proceeding, combining a contested adjudication of what occurred and what punishment should be imposed is a violation of the Due Process Clause. The removal of a judge from elected office should also require this minimal Due Process protection.

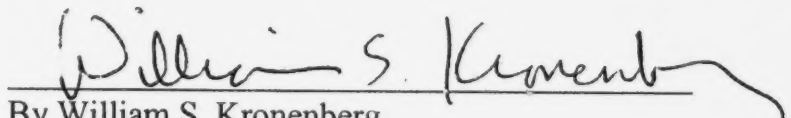
As discussed above, at the rule 121 hearing, the special masters were not empowered to make any decision regarding the level of discipline. The Special Masters considered dispositional evidence irrelevant, except as character evidence to prove conduct. Therefore, it was inappropriate to advocate mitigating factors during the controverted adjudication of the alleged misconduct. However, at the Commission hearing, it was immediately announced that a short time limit was set for oral argument. The presentation of witnesses or other evidence was not allowed. Crucial objections raised in the briefing had not been resolved. Findings on the allegations had not been made by the Commission, whose members were not bound by the findings of the Special Masters. Although the Commission had yet to decide what had happened, the advocates had to discuss what should be done about it. In the few minutes time that was allotted, Judge Van Voorhis could only summarize his main legal objections and briefly try to convey his faithfulness to justice. After over eleven years as a prosecutor and over sixteen years as a judge, facing many allegations against him, he was given just a few minutes to address everything. That's not fair. He should have been given an opportunity to present evidence regarding the level of discipline after findings on the allegations.

IX. CONCLUSION

It is respectfully submitted that the commission's decision and order of removal in this matter violated Judge Van Voorhis' procedural due process rights under the 14th Amendment of the United States Constitution. It is respectfully requested that this matter be set for briefing and oral argument on the merits pursuant to Rule 16 of the Rules of the United States Supreme Court.

Dated: February 4, 2004

MURPHY, PEARSON, BRADLEY & FEENEY



By William S. Kronenberg
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BRUCE VAN VOORHIS

(2)

Supreme Court, U.S.
FILED

031139 DEC 9 - 2003

OFFICE OF THE CLERK

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BRUCE VAN VOORHIS, JUDGE OF THE SUPERIOR COURT OF CONTRA COSTA COUNTY,

Petitioner

V.

COMMISSION ON JUDICIAL PERFORMANCE

Respondent

On Petition for Writ of Certiorari
To The California Supreme Court No. S116146
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S116146

IN THE SUPREME COURT OF CALIFORNIA

En Banc

BRUCE VAN VOORHIS, Petitioner

v.

COMMISSION ON JUDICIAL PERFORMANCE, Respondent.

Request for judicial notice granted.
Petition for review DENIED.

SUPREME COURT
F I L E D
September 10, 2001
Frederick K. Ohirich Clerk
(illegible)
DEPUTY

/s/ GEORGE
Chief Justice

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March 13, 2003
By: _____

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

Inquiry Concerning Judge Bruce Van Voorhis No. 165	ORDER DENYING REQUEST

The request set forth in Mr. Murphy's letter of March 3, 2003 is denied.

Dated: March 12, 2003 By order of the Commission,

/s/
Richard G.R. Schickele
Commission Counsel

PROOF OF SERVICE
STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am employed in the City and County of San Francisco, State of California. 1 am over the age of 18 and not a party to the within action; my business address is 455 Golden Gate Avenue, Suite 14400, San Francisco, California 94102.

On March 12, 2003, 1 served the foregoing document described as

ORDER DENYING REQUEST in Inquiry Concerning Judge Bruce Van Voorhis, No. 165

on the parties in this action by placing true copies thereof in sealed envelope(s) addressed as follows:

Via Facsimile and U.S. Mail	**Via Personal Delivery**
James A. Murphy, Jr., Esq. Murphy, Pearson, Bradley & Feeney 88 Kearny St., 11th Floor San Francisco, CA 94108 FAX: (415) 393-8087	Jack Coyle, Esq. Office of Trial Counsel Commission on Judicial Performance 455 Golden Gate Avenue, Suite 14424 San Francisco, California 94102

[X] (BY MAIL) I caused such envelope with postage thereon fully prepared to be placed in the U.S. Mail at San Francisco, California.

[X] (BY PERSONAL DELIVERY) I delivered such envelope by hand to the office of the addressee(s) noted above.

[X] (BY FACSIMILE TRANSMISSION) I caused such document to be transmitted to the addressee(s) facsimile

number noted above, The facsimile machine I used complied with Rule 2003(3) and the transmission was reported as complete and without error. Pursuant to Rule 2003(6), I caused the machine to print a transmission record of the facsimile transmission, a copy of which is attached to this declaration.

Executed on March 12, 2003, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and, that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ _____
Debra Campbell

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March 3, 2003

VIA FACSIMILE AND MAIL

Commission on Judicial Performance
Richard Shickele
455 Golden Gate Avenue, Ste. 14400
San Francisco, CA 94102-3660

Re: Van Voorhis: CJP
Our File No.: MEND. 109605.1

Dear Mr. Schickele:

On behalf of Judge Bruce Van Voorhis we hereby object to the Commission on Judicial Performance's Decision and Order Removing Judge Van Voorhis from office filed on February 28, 2003. Our objection is based on the denial of Judge Van Voorhis' procedural due process rights by the Commission's failure to provide him with an evidentiary, dispositional hearing following the Commission's adoption of the Special Masters' report. It is our opinion that due process mandated that Judge Van Voorhis be given the right to present evidence on the proposed removal either before the Commission itself or to

the Special Masters under Rule 133(a). This is no different than the rights of criminal defendants to present evidence at dispositional hearings at the time of sentencing following a conviction. By imposing the sanction without considering evidence as to the propriety of removal, Judge Van Voorhis was denied his constitutionally protected right to procedural due process.

On behalf of Judge Van Voorhis it is hereby demanded that the Commission withdraw its Decision and Order, reinstate Judge Van Voorhis to the Contra Costa County Superior Court and provide him a hearing pursuant to Rule 133(a) in order to present evidence on the discipline issue.

SACRAMENTO OFFICE	LOS ANGELES OFFICE
701 University Avenue, Suite 150 Sacramento, CA 95825 Telephone: (916) 565-0300 Facsimile: (916) 565-1636	12400 Wilshire Blvd., Suite 570 Los Angeles, CA 90025 Telephone: (310) 442-8300 Facsimile: (310) 442-8380

Please notify me as early as possible what the Commission intends to do so that our client is not prejudiced in pursuing his relief with the Supreme Court.

Very truly yours,

/s/
James A. Murphy

JAM.10162386

James A. Murphy – 062223
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Attorneys for
BRUCE VAN VOORHIS

RECEIVED
May 23, 2003
CLERK SUPREME COURT

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUDGE BRUCE VAN VOORHIS No. 165	THE HONORABLE BRUCE VAN VOORHIS' PETITION FOR REVIEW OF DETERMINATION BY COMMISSION ON JUDICIAL PERFORMANCE [CRC RULE 935]

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I. INTRODUCTION

On February 27th, 2003, the Commission on Judicial Performance (hereafter "Commission") removed Judge Bruce Van Voorhis stating that the public should not have to tolerate the risk of recurrence of the judge's poor demeanor conduct. In support of this extreme position, the Commission cited a number of cases in which removal was the sanction imposed (after review by the California Supreme Court). However, each of these cases involved some type of corruption or moral turpitude on the part of the judge, typically with a history of prior discipline. Removal was justified given the dishonest and corrupt behavior of those judges.

In stark contrast to the facts of the cases cited by the Commission, none of the misconduct in the Van Voorhis matter involves corruption or moral turpitude. Judge Van Voorhis' conduct is readily distinguishable from the morally corrupt conduct of those judges who have been removed in the past by the Commission. Without the elements of corruption or moral turpitude, the judicial system and the public can be adequately protected by either a public admonishment or at worst, a public censure. As repeatedly emphasized by this Court, the purpose of these proceedings is to protect the public, not to punish the judge. The Commission's disposition is punitive in nature, unreasonably harsh, and completely ignores the testimony of several experienced attorneys who testified that Judge Van Voorhis always strives to achieve fairness and justice in his courtroom.

Given the findings of the Commission, Judge Van Voorhis concedes that discipline is appropriate, but that discipline must be something less than outright removal from office. Removal is not justified in this case and would

serve only to punish Judge Van Voorhis rather than to protect the public.

Aside from the extreme and unprecedented level of discipline, an independent reason for this Court to review the Commission's decision is that the removal order violates Judge Van Voorhis procedural due process rights. In December 2002, when the Commission members retired to deliberate in this matter, the Commission rules required that any member who voted to remove Judge Van Voorhis must have attended the evidentiary hearing before the Masters. (See, Rule 134 of the Rules of the Commission on Judicial Performance as of December 2002.) None of the Commission members who voted on the disposition of this matter attended the evidentiary hearing and the Commission vote was therefore inval*id.* In January, the Commission amended its rules requiring attendance and then rendered its decision in February. The Commission vote was inval*id.*

Improper removal of publicly elected officials solely for demeanor misconduct can undermine our democratic system of government, especially when accomplished without compliance with the procedural safeguards set forth in the Commission's own rules. A judge cannot be deprived of this significant safeguard after the fact for the sake of convenience because it can affect hearing tactics. Judge Van Voorhis had no burden to enforce this rule at the hearing. Judge Van Voorhis should be reinstated.

II. STATEMENT OF ISSUES FOR REVIEW

1. Whether the Commission's vote removing Judge Van Voorhis comported with its own procedures and regulations;

2. Whether the sanction of removal is justified under the findings of fact in this matter;

3. Whether the findings of fact were supported by clear and convincing evidence;

4. Whether the level of discipline imposed upon a Judge should be impacted by an unsuccessful defense before the special masters;

5. Whether due process requires that a judge must receive a dispositional hearing and an opportunity to present dispositional evidence.

III. STANDARD OF REVIEW

The California Supreme Court reviews a determination of a commission decision by conducting "an independent review of the record." (Cal. Const., art. VI, sec. 18.) An independent review of the record requires that the court examine "in full detail the record of proceedings below," and "determine whether each of the charges has been proven by "clear and convincing evidence sufficient to sustain them to a reasonable certainty." (Fitch v. Commission (1995) 9 Cal.4th 552, 556.)

IV. APPROPRIATENESS OF REVIEW

The California Constitution provides the mechanism for the disciplining of judges. (Cal. Const., art VI, sec. 18.) It also establishes that the Commission on Judicial Performance is the entity for disciplining judges subject to review by the California Supreme Court. (Cal. Const., art VI, sec. 8, 18.)

Review by this Court is especially appropriate here where the Commission's removal of Judge Van Voorhis did not comport with its own rules. At the time the Commission members retired to deliberate in December

2002, none of the members had attended the evidentiary hearing before the Masters as required by Rule 134 and thus were not entitled to vote upon the disposition of this matter.

Review is also manifestly appropriate to establish a clear guidance for the judiciary in terms of discipline for demeanor misconduct. The Commission acknowledges that this is the only case where a judge has been removed for demeanor misconduct. Judge Van Voorhis is an elected official and removal of an elected official based on the (disputed) perceptions of a handful of witnesses can undermine our democratic system of government. As discussed below, imposing this severe sanction partly because the official contests the allegations does not comport with due process. The level of discipline must be not affected by the exercise of an unquestioned right to litigate disputed charges. An elected official should not be punished for seeking out his day in court.

The level of discipline imposed is unreasonably harsh and is an extreme method of protecting the public and guiding the future conduct of the judiciary. It is an unprecedented level of discipline even if the factual findings by the Commission are left untouched. This Court should return this matter to the Commission with instructions to reinstate Judge Van Voorhis.

V. PROCEDURAL HISTORY

The Notice of Formal Proceedings was filed on December 17th, 2001. Judge Van Voorhis filed a verified answer to the Notice of Formal Proceedings on January 2nd, 2002.

On January 25th, 2002, the Supreme Court appointed three special masters to hear the matter: Justice Thomas

Hollenhorst of the Court of Appeal, Fourth Appellate District, presiding; Justice Kenneth Yegan of the Court of Appeal, Second Appellate District; and Judge Thompson Hanks of the Superior Court of Riverside County.

The evidentiary hearing before the Masters was held from June 24th through June 27th, 2002. On September 6th, 2002, the Masters submitted their findings of fact and conclusions of law to the Commission. The matter was then briefed and argued before the Commission on December 4th, 2002. On February 27th, 2003, the Commission issued its decision and order removing Judge Van Voorhis from office. The decision became final on March 29, 2003.

VI. LEGAL ARGUMENT

A. The Commission Did Not Lawfully Remove Judge Van Voorhis.

The applicable rule violated by the Commission in removing Judge Van Voorhis was Rule 134 of the Rules of the Commission on Judicial Performance. Until its amendment on January 29th, 2003, Rule 134 provided:

> The commission may privately or publicly admonish, censure, remove or retire a judge, or find a person unfit to serve as a subordinate judicial officer. **The affirmative vote of six members of the commission who have considered the record and report of the masters and who were present at any oral hearing as provided in rule 121** or, when the hearing was before the commission without masters,

> of six members of the commission who have considered the record, and at least four of whom were present when the evidence was produced, is required for a private or public admonishment, censure, removal or retirement of a judge, or a finding that a person is unfit to serve as a subordinate judicial officer, or for dismissal of the proceedings. (Emphasis added.)

The requirements of Rule 134 are mandatory. In order to vote upon the disposition of Judge Van Voorhis, the Commission members were required to attend the evidentiary hearing. They did not. The record of the proceedings reflects that Commission counsel, counsel for Judge Van Voorhis and Judge Van Voorhis were present, but it does not indicate that any of the Commission members were present during any portion of the hearing. Moreover, at the outset of oral argument at the hearing before the Commission on December 4th, 2002, Commission Chairperson Rise Jones Pichon stated that the Commission members had reviewed the record, the briefs and the objections to the findings of the Masters. She did not indicate that any of the Commission members had attended the evidentiary hearing before the Masters. (Transcript of Rule 132 hearing on December 4th, 2002.) It also should be noted that the Commission is required to maintain a record of its proceedings pursuant to Rule 135. There is nothing in the record to indicate that any of the Commission members attended the evidentiary hearing.

Because none of the ten Commission members who voted on the disposition in this matter attended the evidentiary hearing, the vote did not comply with the

mandatory requirements of Rule 134 and is inval*id.* As a procedural matter, it is fundamentally unfair for the Commission to ignore its own rules in reaching a determination that Judge Van Voorhis should be removed. This is especially true in a case with so many disputed issues of fact and where viewing the demeanor of a witness testifying is crucial to properly evaluating and weighing the conflicting testimony.[1]

Nearly two months after retiring to deliberate over Judge Van Voorhis' fate, the Commission amended Rule 134. On January 29th, 2003, Rule 134 was amended to allow the Commission members to vote without attending the evidentiary proceeding before the Masters. Rule 134 now provides that the Commission members are only required to attend the Rule 132 oral argument before the Commission.

"Due process requires a fair trial before an impartial tribunal. Such a trial requires that the person or body who decides the case must know, consider and appraise the evidence." (Vollstedt v. City of Stockton (1990) 220 Cal.App.3d 265, 269.) The fundamental principle is that "the one who decides must hear." (Ibid.) While due process does not require the decision maker to necessarily attend the evidentiary hearing, or to consider every page of the record before making a decision, due process does require compliance with the applicable procedures specified in the statute or ordinance in order for the discharge to be val*id.* (Layton v. Merit System Commission (1976) 60 Cal.App.3d 58, 63.)

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[1] This proceeding was procedurally unfair to Judge Van Voorhis in other respects as well. For example, Judge Van Voorhis' March 3rd, 2003, request to the Commission to present dispositional evidence was denied without explanation. This is discussed below.

Here, the Commission failed to comply with its own applicable rules in removing Judge Van Voorhis. Apparently, upon recognizing that it failed to comply with rule 134, the Commission amended the rule in an ex post facto attempt to legitimize what was clearly an invalid hearing.

In anticipation of an argument that Judge Van Voorhis waived this objection by failing to object during the proceeding, it is respectfully submitted that the requirements of Rule 134 cannot be waived. These requirements are essentially jurisdictional. Simply stated, if a Commission member wanted to affect the disposition of a particular judge, then that Commission member should have been present at the evidentiary hearing. There is no exception to this rule and it is self-executing.

Moreover, an objection by the respondent judge during the proceedings is not feasible. The Commission may discipline a judge with only six affirmative votes, so it is not necessarily objectionable for as many as five Commission members to ignore the entire evidentiary hearing. As a practical matter, it would be procedurally awkward to require a judge to make an objection at the outset of the hearing that some, or all, of the Commission members are not present and then again after each break in the proceedings. The burden is on the Commission members under former Rule 134 to attend the hearing if they wish to affect the disposition. The burden should not be placed on the respondent judge to determine which Commission members are in attendance and whether an objection is warranted based on the level of attendance.

B. The Commission's Decision Of Removal Is Unjustified, Does Not Protect The Public, And Sets A Dangerous Precedent For Future Cases.

The Commission acknowledges that its order removing Judge Van Voorhis is unprecedented. Much of the conduct at issue generally involved a legal argument between an attorney and Judge Van Voorhis about the admissibility of evidence during a criminal trial. The defendant's constitutional right to a fair jury trial was implicated in each of these situations. Judge Van Voorhis' goal was at all times to protect the fairness and integrity of the process. Established precedent dictates that this is at worst prejudicial misconduct.

Furthermore, even if there was prejudicial misconduct by Judge Van Voorhis, then such action was, to a great degree, typically provoked by an attorney. This is not to say that Judge Van Voorhis acted appropriately at all times. However, it is strong evidence that his actions were not taken in bad-faith. Judge Van Voorhis repeatedly expressed his commitment to justice and fairness during the hearing and that testimony is consistent with the experiences of the many seasoned attorneys who have appeared in his courtroom.

As to the remaining allegations, Judge Van Voorhis has either acknowledged he was wrong or attempted to explain the reason for the remarks he made. Clearly, errors by the court staff do not justify harsh statements or public rebuke. However, Judge Van Voorhis did admit that he became frustrated with the repeated errors, and the remarks arose from that frustration. During the evidentiary hearing, Judge Van Voorhis explained that the sheriff's department has had a long history of failing to bring defendants to court when required. This history unfortunately caused Judge

Van Voorhis to make the inappropriate remarks he made to Deputy Brown. While the failings of the sheriff's office do not justify Judge Van Voorhis' conduct, it does help explain the conduct and it is also evidence that the conduct was not undertaken consciously and in bad-faith.

Examination of the prior cases in which removal was warranted demonstrates the extreme nature of the conduct that justifies the imposition of this ultimate sanction. Judge Van Voorhis' conduct is clearly distinguishable.

In the case of Ryan v. Commission on Judicial Performance (1988) 45 Cal.3d 518, Judge Ryan was found to have engaged in four acts of willful misconduct and fourteen acts of prejudicial misconduct. Specifically, on multiple occasions, Judge Ryan told inappropriate sexual jokes to female defendants and attorneys. He was regularly absent from court. Judge Ryan on multiple occasions engaged in inexcusable and unauthorized use of the contempt power. He imposed unusually severe and unjust sentences. Judge Ryan had improper communications with the press, and in one criminal case actually conducted his own investigation of an accident and called a witness to testify as to certain facts which was very prejudicial to the criminal defendant.

In Doan v. Commission on Judicial Performance (1995) 11 Cal.4th 294, Judge Doan was removed for multiple improper ex parte contacts with litigants, witnesses and attorneys. Judge Doan repeatedly failed to disqualify herself and failed to disclose relationships. She engaged in a pattern of improper financial transactions and failed to make required financial disclosures. The California Supreme Court found, in evaluating Doan's misconduct, that she had engaged in moral turpitude, dishonesty, and corruption. (Doan, at p. 339.) She had a prior record of

discipline that was the worst in the State of California at the time she was removed.

In Cannon v. Commission on Judicial Qualifications (1975) 14 Cal.3d 678, Judge Cannon was removed for among other reasons:

- It was "particularly egregious the bad faith and maliciousness with which petitioner arbitrarily ordered the immediate incarcerations of deputy public defenders who displeased her, and denied the effective right of counsel to their clients who were required to defend against charges in on-going criminal proceedings with substituted counsel who were afforded no reasonable opportunity to prepare." (*Id.* at 681.)
- Judge Cannon cautioned a deputy public defender in chambers not to ask certain "stupid" questions at a preliminary hearing, cautioning that "If you are thinking of any outlandish questions, check with the people in lock-up to see how they would recommend the food in county jail for the weekend."
- Judge Cannon was "profane, vulgar, vicious and abusive" in confronting a police officer first at a street intersection and later when the officer was summoned to the Judge's chambers;
- Judge Cannon verbally abused a police officer both in open court and in her chambers when the officer inquired of a deputy district attorney why Judge Cannon had interrupted a preliminary hearing to read a police report and dismiss charges;
- When deputy public defenders had been delayed in interviewing their clients at arraignment proceedings, Judge Cannon required the deputies to state under oath their reasons for the delay, and ordered them to remain in the

lock-up for more than four and a half hours while they conducted interviews;

- Judge Cannon became "very angry" when an accused refused after dismissal on preliminary hearing to stipulate to probable cause for his arrest. Judge Cannon challenged the accused's public defender, had him swear under oath that he had read the arrest report aloud to his client, inquired into his legal training and experience, and when it appeared that the deputy had been in practice but six weeks, stated: "Six weeks and you are telling me you know everything there is to know about the law?"
- Judge Cannon stated to the district attorney's investigator who presented a voucher for the Judge's approval that the witness was an accomplice who was sexually interested in the defendant, that the investigator should not have an affair with the witness, and that he should not repeat any of the Judge's remarks;
- Judge Cannon summoned maintenance and security personnel to her apartment to lodge a complaint. During a half hour confrontation, she directed profanities to the manager, including, "I'm going to shoot you, George, you son of a bitch. And you are going to slowly die."

Geiler v. The Commission on Judicial Qualifications (1973) 10 Cal.3d 270 is also instructive as to nature of misconduct which typically justifies the sanction of removal. In Geiler, Judge Geiler regularly engaged in misconduct of a sexual nature and on one occasion assaulted a court commissioner. Judge Geiler also exhibited a consistent bias against public defenders and was habitually vulgar and profane while acting in a judicial capacity. Specifically:

- Judge Geiler had brandished a dildo in chambers and later used the incident to curtail a public defender's cross- examination;
- Judge Geiler had profanely and abusively reprimanded court employees, and had, in bad faith, interfered with the attorney-client relationship, by indulging his petty animosity toward public defenders;
- Indiscreet use of vulgar, unjudicial and inappropriate language directed toward court attaches and lawyers;
- Judge Geiler engaged in crude and offensive conduct in public places;
- Judge Geiler was found to have approached a court commissioner from behind in a public corridor of the hall of justice and to have grabbed the commissioner's testicles;
- On two occasions, Judge Geiler made lustful references to his female clerk, once while in chambers in the presence of a group of professional associates.
- Judge Geiler was found to have habitually used vulgar and profane language in his conversations with this clerk, and on two occasions to have used profane terms of personal abuse in reprimanding her and another woman employed by the court.
- Judge Geiler was also found to have invited two female attorneys into his chambers wherein he discoursed on the salacious nature of the evidence adduced in criminal cases concerning homosexual acts and rape, punctuating his commentary with profane terms for bodily functions;
- During the early part of 1970, Judge Geiler telephoned his clerk, Mrs. P., and gave her the following instruction with reference to the cases and litigants in his courtroom: "Get the motherfuckers ready. I will be there

shortly." This type of language was found to be typical of Judge Geiler.

- In March of 1970, on an occasion when Mrs. P. returned to court late from her lunch, Judge Geiler told her that she was "nothing but a fucking clerk" and that she was to do exactly as she was told.

- On November 10, 1970, Judge Geiler, while in the office of Mrs. E., the calendar court coordinator for the municipal court, used the following language in reprimanding Mrs. E: "son-of-a-bitch," "bitch," and "fucking clerk." Judge Geiler also stated, "No fucking clerk is going to keep time on me" or "keep track of me," and "Don't you ever forget that you are just a fucking clerk."

- In nine preliminary hearings, Judge Geiler arbitrarily and capriciously relieved the public defender and appointed private counsel. In none of these nine cases was there an assertion of a conflict of interest. The Commission found that petitioner's substitutions of counsel were the direct result of petitioner's hostile attitude toward deputy public defenders.

In Kloepfer v. Commission on Judicial Performance (1989) 49 Cal.3d 826, Judge Kloepfer was removed for engaging in misconduct consisting of four charges of willful misconduct and twenty-one charges of prejudicial conduct. The incidents underlying the charges occurred over the full span of Judge Kloepfer's judicial career, continuing until and after receipt by the Commission of the first complaint in 1985. Among other things:

- Judge Kloepfer misused the contempt power and improperly issued bench warrants and set OSC hearings;

- Judge Kloepfer failed to remain objective in presiding over at least three matters before him;

- In complaining about a court reporter's failure to comply with his request that she come to his courtroom the judge warned that such an incident, "was not to happen again ... he would not be treated as a second-class citizen" The judge was characterized as visibly angry and reduced the reporter to tears. The reporter testified she believed Judge Kloepfer to be generally unpredictable and volatile. He had a reputation of being abusive to employees and to witnesses. He apologized the day after he had his conversation with her.

- When a court reporter asked a defendant to clarify a response, the judge said, "I'll keep the record in my courtroom. I don't need any court reporter," and went on to berate the reporter before a courtroom full of people. The court reporter became upset, nervous, and scared at petitioner's "outburst." (*Id.* at 843.)

- The following statement was made by the judge to a deputy district attorney in a reproving tone in a courtroom full of people - "Miss Bartell, you are an embarrassment to the People of the State of California and it's frightening to think that you represent their interest."

- In another case, involving a deputy district attorney, the Judge stated in open court that he "was appalled that the interests of the People of the State of California rested in her hands," which humiliated and embarrassed the attorney. (*Id.* at 842.)

- Several Deputy District Attorneys testified that the judge occasionally exploded into "bursts of fury" at witnesses and defendants, and became irrationally angry over things that were not their fault; that he had a reputation in the legal community as lacking judicial temperament; that he was rude and intimidating to persons who appeared before him, had an "imperial attitude," and

was intolerant and impatient with persons unfamiliar with court procedure.

- In response to a familiar attorney's motion for continuance, the judge commented, "Isn't it true you are psychologically afraid to take a case to trial?" He then asked her how many cases she had tried, and demanded that she name them and the courts in which they had been tried. His tone was angry and insulting. The attorney was embarrassed because her client was present.

- In May 1984, petitioner interrupted a defense witness in this criminal case who had been asked only two questions. He told her that "we have rules in terms of how we proceed here. And you have to understand them. And I don't want to have to re-explain them and have objections ... [f]irst of all, stop, and don't say anything ... First rule is you keep your mouth shut." The reprimand was given when the witness tried to elaborate on or explain her answer to a question. Petitioner's tone was described as "impatient and angry" and "forceful and intimidating." *Id.* at 844

- The Commission unanimously found that during a nonjury trial of this criminal case on August 13 and 14, 1984, petitioner was hostile to, criticized and chastised a defense witness, made clear by cross-examining the witness that he disbelieved him, and inappropriately threatened the witness with sanctions. Petitioner was openly hostile to the defense during the trial, acted in an intimidating manner toward defense counsel, was personally abusive and insulting to the defendant, and made rude references to the physique and personality of the defendant at sentencing. The court found, "the record supports the finding of the Commission that petitioner's cross-examination reflected hostility and disbelief." *Id.* at 845

• In one matter, Andrew Tricinella, a prosecution witness, was treated rudely by the Court:

> The Court: "Mr. Tricinella, when someone makes an objection, they are talking to me, not you. If you interrupt again, I would - "
>
> The Witness: "I have never been here before."
>
> The Court: "You can be punished with a fine or jail. Keep your mouth shut. It is not directed to you. If there is an objection, it is directed to me. I am the Judge here. You are not. I have to rule on the objection without flak coming from the side. Please remain silent until I ask you to answer the question or sustain the objection, at which point you may not answer the question."

Mr. Tricinella testified that he believed petitioner was going to send him to jail. As a result of the reprimand, he did not want to be involved with the court system. A court reporter who viewed and heard the incident testified that petitioner's remarks were made in an angry and demeaning tone, and that although Mr. Tricinella had tried to answer the question put to him as best he could, petitioner treated him as if he were stupid.

• The judge commented to a non-English speaking defendant and his attorney "either he does understand or he doesn't, and if he sits there and looks like a bump on a log and has no ability to respond to me that he understands intelligently what is being interpreted to him in Spanish, I

have no confidence that he will follow the directions of the court, and therefore I will cage him, in effect, in jail and bring him back ... uh ... manacled and he will appear when I order him to appear."

- During another matter, the Judge told a defendant, "I am talking to you, sir, and when I talk to you I expect you to pay attention with me and not start a conversation with your attorney. Do that again sir, I am going to hold you in contempt of court and jail you."

In contrast to the cases cited above, Judge Van Voorhis' conduct, although discourteous, is clearly distinguishable from the cases in which removal was appropriate. As concisely stated by Justice Vance W. Raye, in his dissent from the Commission's decision and order of removal, "what is necessary to protect the public from boorish behavior is different from what may be necessary to protect the public from corrupt decision making based on friendship, a persistent pattern of ex parte contacts and alteration of court records, persistent failures to perform duties in a diligent fashion, accepting gifts from litigants, abuse of the contempt power, prejudgment of cases, or interfering with the conduct of a Commission investigation." (Decision, Raye dissent, at p. 55-56.) As recognized by Justice Raye, removal is too great a sanction here. It will not serve to protect the public and it potentially imposes a chilling effect on the judiciary.

A review of previous cases in which discipline was imposed for demeanor misconduct reveal that even multiple instances of demeanor misconduct, without more, are typically punishable by public admonishment. For example, in the matter of Alexander H. Williams, III, (Los Angeles County Superior Court, 1/22/97) the Commission found public admonishment to be an appropriate sanction.

Among other things, Judge Williams used profanity, made a vulgar gesture and he threatened retaliation toward counsel in a case pending before the judge. Specifically:

- In the midst of a pretrial settlement conference, the Judge confronted an attorney in the hallway and claimed, "your demand for money is bullshit. If you keep making this demand, you can stick it right here!" while making a gesture with a rolled up newspaper toward the attorney's rear.

- He then called the plaintiff's claim "bullshit" again to the opposing attorney.

- Later, the judge's comments included, "If you think you're going to get money out of this case, you've got shit for brains ... If you want a war, you'll get a war! ... If you still think you're going to get money, I've got a Brooklyn Bridge I can sell you. No jury I know of is going to give you money for this case. I'll set it for trial in 1999 and make sure it goes nowhere. You didn't want to settle, so now you're my enemy."

When the case was transferred to another judge, Judge Williams made disparaging remarks about that judge.

- He then told the plaintiff's attorney to "Get Out," when the case was reassigned and repeated the "shit for brains" comment.

In the matter of Judge Robert C. Coates (San Diego County Superior Court, 4/12/00) the Commission found public admonishment to be an appropriate sanction where Judge Coates, among other things:

- He threatened an analyst who failed to deliver papers to the judge, and then referred to the analyst as a "piece of shit."

- When a schoolteacher raised the possible conflicts with her schedule at voir dire, rather than at the outset of

jury selection, the judge reacted by accosting the potential juror, saying, "Do we really want you teaching our children?" He also tried to embarrass her by stating, "we've lavished expense upon you."

- Judge Coates attempted to impeach an expert witness whom he thought gave a phony credential. He accused the expert of being a liar in front of the jury over council's objections, and before double checking the record to make sure he was not mistaken.
- He berated a court clerk for taking away a water fountain as was ordered and used the word "goddamn" during the altercation.
- After a scheduling "mix up", the judge accused a secretary and "ordered" her to take steps "not to repeat" such a mistake in the future.

To be subject to removal by disciplinary action, those holding elected judicial office have to abuse their power for a corrupt purpose or act in bad faith. In the context of judicial misconduct, the word "intentional" means more than merely "volitional."

The evidence that Judge Van Voorhis' conduct was in bad faith was not legally sufficient. Even repetitive acts of poor judicial temperament do not necessarily mean that the next improper act was volitionally done in bad faith. Judge Van Voorhis tried his best consistently, but occasionally gave a poor performance. It wasn't shown to be otherwise by clear and convincing evidence. For that matter, neither was the appearance of ethnic bias. Judge Van Voorhis deserves a significant re-evaluation by the California Supreme Court, a referral to the Commission on Judicial Performance based upon corrected findings, and reinstatement into office.

C. The Commission's Findings of Fact and Conclusions of Law Were Not Supported By Clear and Convincing Evidence.

COUNT ONE

Count One involves an allegation that Judge Van Voorhis either intentionally made an incorrect ruling or gave the appearance of making an intentionally incorrect evidentiary ruling to see how a deputy district attorney would handle it. Notably, the Commission did not find that Judge Van Voorhis deliberately made an incorrect ruling. (Decision and Order of Removal, at p. 3.) Rather, the Commission found that Judge Van Voorhis gave the appearance of making an intentionally incorrect evidentiary ruling to see how a deputy district attorney would handle adversity.

The Commission then determined that this was prejudicial misconduct. Specifically: "To the 'objective observer,' the judge's statement that he made a ruling for the purpose of seeing how the prosecutor would handle it, was prejudicial to the public esteem for the judicial office." (Decision and Order of Removal, at p. 4.)

This conclusion of law is erroneous because there is not clear and convincing evidence that Judge Van Voorhis ever made any statement that objectively would provide an appearance that a ruling was made merely to see how a prosecutor would handle it. In fact, there is not clear and convincing evidence in the record of precisely what Judge Van Voorhis said to Ms. Brock.

There is a substantial conflict in the testimony of the three deputy district attorneys who were present in the courtroom that day such that the testimony cannot be reconciled. Critically, the three attorneys cannot agree on

the location of the conversation, who initiated it, how long it was, and what was said. If the attorneys cannot agree on what Judge Van Voorhis actually said, then there is not clear and convincing evidence of the appearance those words would create. This is especially true because one district attorney, Chris Nimr, admitted his recollection was probably colored after the fact during extensive discussions with other attorneys at the district attorney's office.

The discrepancies in the testimony of the three deputy district attorneys are set forth below.

A. Deputy District Attorney Stacy Brock:

Ms. Brock recalls having a conversation with Judge Van Voorhis after the conclusion of the Elze trial. The conversation lasted approximately two minutes at the most. (RT 74:19-22.) During the conversation, Ms. Brock was in the back of the courtroom. (RT 69:24-25; 71:18-23.) Ms. Brock believes that Danielle Douglas and Chris Nimr were also in the back of the courtroom with her. (RT 69:9-13.) (This is contrary to both Ms. Douglas and Mr. Nimr's testimony.) The conversation was initiated when Danielle Douglas asked Judge Van Voorhis how Ms. Brock was doing in a friendly way. (RT 70:4-16.) Judge Van Voorhis then provided Ms. Brock with some words of encouragement, specifically that Ms. Brock was developing, was becoming a better attorney, and had handled herself well during trial. (RT 40:13-19; 70:16-17; 73:10-13.)

Ms. Brock contends that the Judge Van Voorhis then told her, "I knew you were entitled to the statements, but I kept them out to see how you'd handle yourself." (RT 84:7-9.) However, during cross-examination, Ms. Brock acknowledged that Judge Van Voorhis also stated that there

are occasions when an attorney has to anticipate an unanticipated ruling by a judge. (RT 73:14-17.) Ms. Brock also conceded that Judge Van Voorhis told her that an attorney has to be able to adjust to an unexpected ruling. (RT 73:18-25.) These latter statements are supportive of Judge Van Voorhis testimony that he provided Ms. Brock with examples of when a judge might do something unusual and that a good attorney has to be prepared for anything and not overreact to adverse rulings.[2]

In crediting Ms. Brock's testimony over the other three individuals who were present (Judge Van Voorhis, Douglas and Nimr), the Commission ignored the fact that Ms. Brock is an admittedly biased witness. Ms. Brock traveled from New York at the request of the Commission to testify against Judge Van Voorhis. (RT 53:18-20.) While the Commission paid for Ms. Brock's flight to attend the hearing, Ms. Brock incurred hotel expenses out-of-pocket in order to testify against Judge Van Voorhis. (RT 53:16-17.) Stated another way, she has voluntarily traveled all the way from New York and paid money to testify against Judge Van Voorhis. Moreover, she agreed to be interviewed by the Commission on multiple occasions, but she would not permit counsel for Judge Van Voorhis to interview her even in New York. (RT 54:1-2; 54:7-9.) Ms. Brock obviously resented the adverse evidentiary ruling that she received. (RT 35:9-10; 67:25-68:1) It is not credible that Ms. Brock could provide a precise quote of what Judge Van Voorhis said over two years after the fact

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[2] Incidentally, Commission Staff Counsel Bruce Hinze did not obtain a quote from Ms. Brock as to Judge Van Voorhis' exact statement when Hinze interviewed Brock on February 14, 2001, which is less than two weeks after the Elze trial. (RT 489:4-12.)

at the evidentiary hearing, but did not provide a precise quote to a Commission investigator less than two weeks after the incident.

B. Deputy District Attorney Danielle Douglas:

In January and February 2001, Danielle Douglas was the misdemeanor team leader in Walnut Creek for the Contra Costa County District Attorney's office. (RT 86:20-23.) Ms. Douglas prepared the Elze trial for Ms. Brock and specifically recalls discussing the defense motion in limine with Ms. Brock prior to trial. (RT 89:5-11; 91:18-21.) However, Ms. Brock testified that she recalls not preparing for the motion in limine. (RT 60:13-15)

Ms. Douglas recalls going to Judge Van Voorhis' courtroom to see how Ms. Brock was doing in the Elze trial. (RT 88:6-10.) She recalls walking into the courtroom perhaps in the middle of Judge Van Voorhis speaking to Ms. Brock. (RT 95:14-17) Ms. Brock was standing in the well between the prosecutor and defense counsel's table. (RT 95:7-12.) This is contrary to both Ms. Brock's (RT 69:11- 71:1) and Mr. Nimr's testimony (RT 610:22-24). In fact, all three deputy district attorneys cannot agree on the location of the conversation between Judge Van Voorhis and Ms. Brock.

Ms. Douglas admits that she does not know when the conversation between Ms. Brock and Judge Van Voorhis started. (RT 96:3-6.) When Ms. Douglas entered the courtroom, she walked to counsel table and stood in the well with Ms. Brock. (RT 99:4-14; 100:11-15.) Ms. Douglas cannot recall the first word she heard or who uttered the first word. (RT 98:19-22.) Ms. Douglas believes that she was in the courtroom for five minutes

while the conversation between Judge Van Voorhis and Ms. Brock was going on. (RT 98:23-99:3.) Ms. Brock, on the other hand, testified that Ms. Douglas initially engaged in friendly conversation with the judge on the topic of Ms. Brock's performance (RT 70:10-20; 72:4-24) and the conversation was two minutes long. (RT 74:21-22) Ms. Brock also testified that the conversation occurred in the back of the courtroom (RT 69:11-71:1) and that Douglas and Nimr were present when the conversation began. (RT 69:9-13)

Ms. Douglas testified on direct examination that Judge Van Voorhis made the following remark during the conversation:

> "Well, I remember that [Judge Van Voorhis] said that the statements that were excluded should have come in, they didn't, he wanted to see how Stacey would handle it because once she hits the felony trial team, she'll have judges that do strange things, and he wanted to see how she would adapt with not having the statements in." (RT 88:24-89:4.)

Later, during cross-examination, Ms. Douglas testified that she could not recall the exact words used by Judge Van Voorhis:

> "After Judge Van Voorhis said that – I don't remember the exact words; I want to say bizarre or strange, you know, that he wanted to see how she would handle the, handle the statements not coming in, because when she went to the felony trial team, that the judges

> up there might do some strange things, and I said something about some, that I found it hard to believe that there would be a judge who could [sic] something stranger than in this court." (RT 99:23-100:6; Italics added.)

Ms. Douglas gave Bruce Hinze, investigator for the Commission, a different version that condensed five minutes of talking (RT 98:23-99:1) into essentially three sentences (which she placed in reverse order when compared to her testimony). (RT 486:20-24; 490:4-8.)

C. Deputy District Attorney Christopher Nimr:

Christopher Nimr has been a deputy district attorney for the Contra Costa District Attorney's office since January 15, 2001. (RT 607:6-12.) The day of the incident, Mr. Nimr recalls following Ms. Douglas into Judge Van Voorhis' courtroom. (RT 609:4-8.) Mr. Nimr had been a licensed attorney for less than three weeks at the time.

Mr. Nimr's recollection of events is different than that of Ms. Brock and Ms. Douglas. Mr. Nimr did not overhear Douglas making any comments. (RT 618:15-18.) Although contrary to Mr. Nimr's testimony, Stacy Brock believes that Danielle Douglas initiated the conversation with Judge Van Voorhis after trial. (RT 70:4-16.) Douglas, however, admitted that she might have walked into the middle of a conversation initiated by Brock. (RT 96:3-6.) Douglas could only recall making one comment. (RT 99:22.)

Mr. Nimr also quite candidly admitted that he had conversations with individuals at the district attorney's office after February 2001 and that his recollection could be colored by those conversations. (RT 619:18-23.)

Notably, Ms. Brock testified that there were "extremely" extensive discussions at the district attorney's office regarding the incident. (RT 82:2-11.)

Mr. Nimr recalls standing near the bar of the courtroom. (RT 610:22-24.) He estimated that he was there maybe five minutes. (RT 610:10-12) Mr. Nimr testified that Judge Van Voorhis told Ms. Brock that: "Sometimes judges will rule exactly the opposite of the way the law is. You can't break down. You have to continue to go on." (RT 612:10-20.)

D. Judge Van Voorhis:

After trial was completed, Judge Van Voorhis recalls Ms. Brock inviting him to engage her in an informal discussion about practicing law. (RT 678:19-20; 679:3-4.) Judge Van Voorhis began by telling Ms. Brock that he was going to discuss strategy and how unexpected results during trial can affect strategy. (RT 679:19-23.) Judge Van Voorhis drew an analogy between unexpected results in the courtroom and the unexpected results on the battlefield, and among other things, made reference to the Battle of Thermopylae. (RT 680:6-681:5.) After Judge Van Voorhis made this analogy, Danielle Douglas and Chris Nimr entered the courtroom.(RT 681:6-11.) At that time, Judge Van Voorhis was explaining that unexpected results can occur during trial, and while Ms. Brock ordinarily should have expected a victory on the Miranda issue, and the Judge knew that, she failed to consider the unexpected result. (RT 681:6-20.)

Judge Van Voorhis then gave Ms. Brock specific examples of why unexpected results could occur, stating: "I could just want to get on with the case. I could want to protect my record on appeal. I could just want to see your reaction." (RT 681:21-682:1.) Ms. Douglas then

interjected that those remarks were not consistent with her experience. (RT 682:2-7.) Judge Van Voorhis continued speaking to Ms. Brock, explaining that "[w]hen you encounter an unexpected result, you have to, you know, reassess your strategy, see where you are and then move on and go on with it and not let it upset you. It can't throw you off." (RT 682:9-13.)

1. The Commission's Interpretation of Judge Van Voorhis' Remarks Is Not Objectively Reasonable.

There were four individuals present when the alleged remarks were made: Judge Van Voorhis, Ms. Brock, Ms. Douglas and Mr. Nimr. In weighing this evidence, the testimony of Mr. Nimr was largely consistent with Judge Van Voorhis' testimony and must be balanced against the testimony of Ms. Brock and Ms. Douglas (who cannot even recall exactly what Judge Van Voorhis sa*id.*)

Mr. Nimr and Ms. Brock both testified that there were extensive discussions between the district attorneys about Judge Van Voorhis and his alleged statement after the discussion occurred. During the hearing, Mr. Nimr quite candidly admitted that he had conversations with individuals at the district attorney's office after February 2001, and that his recollection could be colored by those conversations. (RT 619:18-23.) Ms. Brock testified that there were "extremely" extensive discussions at the district attorney's office regarding the incident. (RT 82:2-11.) These facts should have been included in the master's findings of fact and this evidence should have been considered by the Commission. This is evidence that the recollection of the three involved district attorneys is inaccurate and that the district attorneys' interpretation of

Judge Van Voorhis' remarks is not objectively reasonable under the circumstances.

There are several possible interpretations of Judge Van Voorhis' message to Ms. Brock. Judge Van Voorhis' explanation for his comments to Ms. Brock is the most reasonable. Specifically, his message was that Ms. Brock should not become visibly upset when she receives a ruling she disagrees with. There is undisputed evidence that Ms. Brock did overreact to Judge Van Voorhis ruling and for this reason he advised her that she should better prepare herself for unexpected results at trial. It is respectfully submitted that this is not unusual advice for a young lawyer to receive from a more experienced judge or lawyer. Notably, defense attorney Timothy Gomes believed that Ms. Brock continued to press the issue of the admissibility of the statements after the Court had ruled, that the ruling upset her, and that she did not behave appropriately. (RT 466:10-18; 468:5-17.)

Without explanation, Mr. Gomes testimony was omitted from the findings by the Masters and the Commission. This testimony, however, is extremely relevant given the Commission's interpretation of Judge Van Voorhis' remarks. Not one witness appeared to offer evidence that Ms. Brock acted appropriately after the ruling or that she did not become upset. It was clearly established that Ms. Brock became inappropriately and perhaps unprofessionally upset when she received the adverse ruling. It was entirely reasonable, and perfectly permissible, for Judge Van Voorhis to advise a young lawyer that judges sometimes do strange things and that she should not become upset if she receives what she believes to be an incorrect ruling.

Furthermore, it was Judge Van Voorhis' good-faith belief that the statement by the defendant at issue was properly excluded under California law. (RT 660:23-663:16.) This evidence was undisputed and it is supportive of Judge Van Voorhis' position that in discussing trial tactics with Ms. Brock after trial, Judge Van Voorhis was attempting to communicate to Ms. Brock the importance of dealing with surprising rulings from a judge without becoming visibly upset.

Because there are multiple, objectively reasonable interpretations of Judge Van Voorhis' remarks to Ms. Brock, the Commission did not meet its burden of establishing the allegations set forth in Count One by clear and convincing evidence. If the Commission's finding of misconduct is premised upon an interpretation of what was said, and the appearance arising from that interpretation, then the Commission must prove what was said by clear and convincing evidence and it must eliminate all other objectively reasonable interpretations before there can be a finding of prejudicial misconduct.

COUNT TWO A(1)

Count Two A(1) arose during the trial of People v. Silva which Judge Van Voorhis presided over on June 1 and 2, 1999. During the Silva trial, Judge Van Voorhis made reference to the defense attorney's law school education while arguing for the admissibility of certain third party culpability evidence. The Commission omitted several undisputed facts in order to reach its finding that Judge Van Voorhis committed prejudicial misconduct in this count.

First, the Commission, without any explanation, excluded the fact that the prosecutor, Ms. Filkowski,

believed that the defense attorney, over her objection, was intentionally attempting to improperly put inadmissible evidence in front of the jury. (RT 253:3-9; 254:12-15.) Ms. Filkowski's perception was shared by Judge Van Voorhis and helps explain why the exchange with Mr. Gardner occurred. It does not justify Judge Van Voorhis remarks, but the provocation does place the conduct in a vastly different light. The remarks made by Judge Van Voorhis were admittedly in poor taste, but the fact that the remarks were provoked by perceived attorney misconduct is a substantial mitigating factor. This mitigation evidence should have been included in the findings of fact.

Second, the Commission omitted Mr. Gardner's perspective of his exchange with Judge Van Voorhis. During trial, Mr. Gardner presented an argument that certain third party culpability evidence was admissible and Judge Van Voorhis ultimately ruled against him. (RT 450:9-11.) Mr. Gardner believes that the judge was courteous to him, but "a little bit harsh." (RT 450:14-16.) Judge Van Voorhis was stern, but did not yell at Mr. Gardner. (RT 450:23-24; 451:1.) Notably, Mr. Gardner did not believe he got into a dispute with Judge Van Voorhis over the third party culpability issue. (RT 450:9.)

Third, Judge Van Voorhis testified that he regrets making the remarks at issue and has acknowledged that he could have spoken in a better manner. (RT 555:4-11.) This is a significant fact in mitigation and it was undisputed at the hearing. There was no reason to exclude this fact from the findings.

COUNT TWO A(2)

Count Two A(2) involved an argument over the admissibility of testimony about horizontal gaze nystagmus

which occurred during trial. The Commission found that Judge Van Voorhis impugned the prosecutor by accusing her of starting something she had no intention of finishing and of acting in bad faith. According to the Commission, the import of Judge Van Voorhis' statement was that counsel was acting inappropriately and perhaps unethically. The Commission found that this accusation was done solely to deliberately ridicule her and prejudice her case in front of the jury. The Masters found that this was willful misconduct and the Commission joined in this finding. (Decision, at p. 13.)

The Masters found that Judge Van Voorhis engaged in willful misconduct because the "judge's statements here could not have been meant for any purpose other than to deliberately ridicule Ms. McMurray and prejudice her case in front of the jury." (Masters' Findings at p. 22.) The Commission joined in this finding which is extraordinarily punitive and is not supported by clear and convincing evidence. (Decision, at p. 13)

Willful misconduct is reserved for unjudicial conduct committed in bad faith by a judge acting in his judicial capacity. "The term 'bad faith' implies that the judge 'intentionally committed acts which he knew or should have known were beyond his lawful power.' As so used, 'bad faith' entails actual malice as the motivation for a judge's acting ultra vires." (Spruance v. Commission on Judicial Qualifications (1975) 13 Cal.3d 778, 796.) "In sum, 'bad faith' is quintessentially a concept of specific intent, requiring consciousness of purpose as an antecedent to a judge's acting maliciously or corruptly." (Spruance v. Commission on Judicial Qualifications, at p. 796.)

The masters found that Judge Van Voorhis' conduct was in bad faith citing Cannon v. Commission on Judicial

Performance (1975) 14 Cal.3d 678 as support for the finding. In the Cannon matter, however, Judge Cannon, among many other charges, conceded that she deliberately and intentionally ridiculed a public defender. The admission supported a finding that Judge Cannon's conduct was intentional and malicious. There were also multiple abuses of the Judge's contempt power in Cannon.

Cannon is readily distinguishable from this matter. Judge Van Voorhis denies taking any action to ridicule Ms. McMurray. Instead, Judge Van Voorhis felt that the court was obligated to advise the jury that it was not to consider the disputed evidence in order to insure that the criminal defendant received a fair and unbiased trial. The evidence was stricken, and the jury was instructed why it was being stricken. The purpose of the admonishment was not to disparage the deputy district attorney, but rather was for the protection of the criminal defendant. The statement was followed by the judge polling the jury to be certain that the criminal defendant would not be prejudiced by the prosecutor's mistake. (Respondent's Exhibit 1, at pp. 87:11-88:16.) The deputy district attorney later admitted her mistake on the record. (Respondent's Exhibit 2, at p. 98:12-25.)

Even if Judge Van Voorhis' remarks on this occasion were inappropriate, that does not constitute willful misconduct because there is no evidence that he was not faithfully trying to discharge his judicial duties. Upon defense counsel's objection, Judge Van Voorhis was required by the Evidence Code to explore whether a sufficient evidentiary foundation could be laid supporting the admissibility of the sobriety test evidence. He handled the objection by appropriately inquiring into the existence of substantiating expert opinion. It was Judge Van

Voorhis' good-faith belief that, under California law, the inquiry did not have to be conducted outside the presence of the jury. The case of People v. Williams (1997) 16 Cal.4th 153, holds that it is within the court's discretion whether to decide admissibility questions in the presence of the jury.

Judge Van Voorhis initially thought the matter could be quickly and easily resolved in the presence of the jury in order to save time. Judge Van Voorhis correctly ruled in the presence of the jury that a prosecutor cannot open the topic of a sobriety test without substantiating expert opinion testimony laying the foundation for its relevance. The discussion of the objection included a remark about the inappropriateness of opening the topic if it had been known that no substantiating expert opinion testimony was forthcoming. The defect in admissibility related solely to the unavailability of a competent witness and the prosecutor explained why the topic had been opened. Without an adequate explanation, the jury trial could have ended in a mistrial. Judge Van Voorhis obviously accepted the explanation in the presence of the jury. He offered the opportunity to either cure the defect or accept a curing instruction to disregard the topic. When substantiating expert opinion testimony still appeared not to be forthcoming, he properly instructed the jury to disregard the topic of horizontal gaze nystagmus.

Judge Van Voorhis reasonably concluded that the particular officer testifying did not have sufficient training and experience to qualify the officer as an expert on why or how the gaze nystagmus test was an indicator of alcohol intoxication. (Respondent's Exhibit 1, at p. 79:27-28.) The prosecutor, Ms. McMurray, acknowledged on the record that there would be no expert produced on this point.

(Respondents Exhibit 1, at p. 81:6-10.) While People v. Joehnk (1995) 35 Cal.App.4th 1488, 1507-1508 (cited in the Decision at p. 9) may stand for the proposition that a trained law enforcement officer can testify to the results of the test, there was no showing that the testifying officer was a properly trained officer. Ms. McMurray told the Special Masters that she believed the officer was qualified, but this belief was based only on an informal, ten minute interview with the officer immediately before trial started. (RT 128:16-129:16.) She didn't tell the judge that there was an expert witness. (Respondents Exhibit 1, at p. 81:6-10.)

Experienced defense attorney David Larkin observed the entire exchange between Judge Van Voorhis and Ms. McMurray and he did not think that Judge Van Voorhis was harsh, sarcastic or discourteous. (RT 502:22-25; 509:12-13.) With respect to demeanor, Ms. McMurray believed that Judge Van Voorhis was not condescending to her initially. (RT 135:13-17.) She thought that Judge Van Voorhis became condescending and sarcastic toward her afterwards. (RT 135:13-17.)) Judge Van Voorhis never raised his voice during the exchange. (RT 502:18-21.) Mr. Larkin's perception was that Ms. McMurray was very argumentative with the Court. (RT 502:1-3.)

Mr. Larkin's testimony was that Judge Van Voorhis' admonishment to Ms. McMurray was appropriate. (RT 503:12-16.) Mr. Larkin testified as follows:

> I felt it was very appropriate. I don't think there was any question because this is an issue that comes up repeatedly in driving-under-the-influence cases, that that evidence was inadmissible.

> I was surprised that she was even going there. And so I – I think that the law was really clear. I think the judge's ruling was straightforward. And I was surprised that Ms. McMurray, who I think had more than ample opportunity to move on and – and go on with the case, didn't. She just continued to argue that issue in front of the jury when the judge had clearly ruled and stated what his position was. (RT 503:12-504:2.)

There are legitimate reasons why a judge would start discussing an objection to the admissibility of evidence in the presence of a jury. For example, judges in limited jurisdiction branch courts are under tremendous pressure to be economical with time and resources. In Judge Van Voorhis' court, there are always other jury trials scheduled to begin just two days after this one starts. Jury panels arrive every Tuesday and Thursday morning. Mondays must be devoted to other business. Jury panels kept waiting get grumpy. After experiencing fifteen years of this pressure, a judge might be predisposed to see if counsel quickly concedes an objection, or to try discussing it quickly in the presence of the jury, but that can sometimes gradually lead into an unexpected, lengthy argument. Knowing just when to excuse the jury is not a simple matter. If Judge Van Voorhis became embroiled and made an honest mistake in handling this objection, it does not constitute willful misconduct.

Another reason why a judge might discuss an objection in the presence of the jury is that if the jury hears a discussion of the reasons why the evidence is inadmissible, it can serve the purpose of enabling them to better

understand the controversy, the rationale for the rule, and to more enthusiastically follow the court's curing instruction to disregard the topic. Keeping jurors in the dark about the reasoning behind the sudden exclusion of evidence has its disadvantages. Repeatedly allowing attorneys to approach the bench presents difficulties in reporting the conference and the jury might overhear, so a recess would be required. Judge Van Voorhis occasionally allows a jury to listen to a discussion of an objection. No legal authority dictates that the jury must always be excused. In fact, People v. Williams (cited earlier) is legal authority that the jury does not have to be excused.

Judge Van Voorhis stated his reasons for not excusing the jury in his testimony. The Special Masters did not find his reasons were fabricated. Instead, the Special Masters denied the entire existence of these reasons. Whether a reasonable judge would have handled the issue outside the presence of the jury is not the test.

What Judge Van Voorhis did in this case cannot be willful misconduct, because it is equally plausible that all of his actions were undertaken in good faith out of respect for the rules of evidence. If the wisdom of his ruling was to be the subject of the published disciplinary hearing findings, the judge's reasoning should have been defended in the findings.

COUNT TWO A(3)

The allegation that Judge Van Voorhis manifested bias or prejudice against Mr. Alvear because of Mr. Alvear's race is not supported by clear and convincing evidence. Not one witness has testified that Judge Van Voorhis made any comment about Mr. Alvear's race or ethnicity. The Commission does not dispute this fact. The remarks made by Judge Van Voorhis are solely about an accent and have

nothing to do with race. The Commission also does not dispute this fact. The remarks would be equally applicable to a Caucasian male from Boston, New York, Mississippi, or Texas with a thick accent.

Objectively, Judge Van Voorhis' advice that Mr. Alvear should work on his accent in order to communicate better is not clear and convincing evidence of bias or the appearance of bias based on race or national origin because Mr. Alvear was hard to understand, and a word in a question asked by him was briefly mistaken by at least two people as offensive slang. Furthermore, at least one juror had difficulty with Mr. Alvear's accent. (RT 351:3-11.)

The special masters conceded that the objective public could interpret Judge Van Voorhis' remark in multiple ways, and that the remarks were not necessarily indicative of bias related to Mr. Alvear's ethnicity. (Master's Findings, at p. 27.) The Masters found only that the objective public "could" have the perception of ethnic bias. (Ibid.) It is respectfully submitted that the possibility of this interpretation does not satisfy the Commission's burden of proving the charge by clear and convincing evidence.[3]

Giving insensitive advice solely about an accent on a single occasion does not manifest bias or prejudice based on race or national origin. The words spoken do not criticize race or ethnicity on their face or by implication. No preference, disfavor or bias is revealed whatsoever.

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[3] Although there are three somewhat different versions of what Judge Van Voorhis said, it is undisputed that Judge Van Voorhis never made any comment to Mr. Alvear about his race or ethnicity. The Judge intended only to help Mr. Alvear and not to belittle or demean him. (RT 541:23-542:6.) Both attorneys agree that Judge Van Voorhis was complimentary to Mr. Alvear.

A reversal of the finding of ethnic bias will establish that where a lawyer's word was misconstrued as offensive slang by a witness, a judge may offer advice that the lawyer can improve by trying to work on the lawyer's accent in order to better communicate with the jury without necessarily engaging in prejudicial misconduct by appearing to manifest bias or prejudice based on national origin. A reversal of this finding does not disturb the finding establishing that the criticism was discourteous and undermining of the client's and the public's confidence in the attorney and subject to discipline.

The possibility that the public would perceive a judge's behavior as indicative of bias is not the same as the appearance of bias. As an illustration, at the hearing before the Commission on Judicial Performance, in his address to the members, Judge Van Voorhis stated, "Ethnic bias is unjustifiable. Isn't the phenomenon a ridiculous paranoia that we should all try to eliminate? Everyone please nod yes." If one of the judges sitting before him had not nodded, that failure to nod possibly could have been perceived by members of the public as indicative of bias. Would failure to nod constitute prejudicial misconduct? The appearance of possible bias isn't created by a mere possibility. The appearance of ethnic bias must be clearly established. The Commission failed to find that there was an appearance of bias. Rather, the Commission found only that there was a possibility of bias.

Regardless of whether the search is for witches, Communists, or bigots, we must not brand anyone with such a powerfully stigmatizing label without sufficient evidence. While it is true that ethnic bias need not be proven to actually exist within the mind of the judge, the behavior must be proven by clear and convincing evidence

and the ethnic bias also must appear with clarity to an objective observer. The Commission did not apply these criteria.

Furthermore, the Commission's decision implies that Mr. Alvear's subjective feelings are a relevant consideration with respect to the level of discipline that should be imposed. This implication is without any support in the law. (Decision at p. 13.) The well established rule is to measure judicial conduct by an objective standard. (Geiler v. Commission (1973) 10 Cal.3d 270, 277.)

The reason that Mr. Alvear's subjective feelings are irrelevant is best understood when considering the same judicial conduct as perceived by a "thin-skinned" individual versus a "thick-skinned" individual. While the former person may be greatly upset by a particular act of judicial conduct, the latter may not be bothered at all. To allow the level of discipline to be influenced by the percipient witnesses' subjective feelings (as seemingly urged by the Commission) departs from nearly thirty years of established precedent and, as a practical matter, would result in inconsistent levels of discipline being imposed depending on whether the witness to the alleged misconduct was especially sensitive or not. This would be fundamentally unfair and it is the reason for an objective standard.

The finding that Judge Van Voorhis' comments to Mr. Alvear constituted prejudicial misconduct is not supported by clear and convincing evidence. This finding should be reversed.

COUNT TWO A(4)

In Count Two A(4), the Special Masters found that Judge Van Voorhis engaged in a lengthy, antagonistic, discourteous critique of a prosecutor's performance and

ethics during a jury trial. The Commission found that Judge Van Voorhis engaged in willful misconduct because Judge Van Voorhis made his comments to the prosecutor for a corrupt purpose. The corrupt purpose was to vent anger or frustration. (Decision, at p. 18.)

The following facts were not included in the Commission's findings which undermine the Commission's conclusion that Judge Van Voorhis engaged in willful misconduct:

On March 7, 2001, during an in limine motion hearing in People v. McDonald, defense counsel sought to exclude evidence of a no contest plea entered by the defendant in a theft case in Santa Cruz County. (Respondent's Exhibit 10.) Judge Van Voorhis inquired of Deputy District Attorney Meade whether she intended to offer evidence of the past behavior. (Respondent's Exhibit 10, p. 6:20-28.) When Ms. Meade answered in the affirmative, the court instructed her to say "precisely" how she was going to prove the behavior. (Respondent's Exhibit 10, p. 7:6-8.) Ms. Meade said she would ask the defendant if he was convicted of the offense during cross-examination. (Respondent's Exhibit 10, p. 7:9-10.) She did not indicate that she intended to inquire if the defendant was on probation for the offense.

It is undisputed that Ms. Meade then improperly inquired into the status of the defendant as a probationer. The defense attorney believed that this was prosecutorial misconduct. (RT 337:19-338:1.) Judge Van Voorhis interrupted because he felt that fairness was in jeopardy. (RT 563:16-23.) The in limine ruling was specific and precise and there was no basis for asking the questions that the prosecutor posed to the defendant. The potential prejudicial effect of the question was immediate and noticeable, and the court needed to insure that the

defendant received a fair trial. In Judge Van Voorhis' opinion, the jury could properly overhear the discussion of the nature of the error, the efforts taken to prevent the error, and the admonishment of counsel. Conducting such an inquiry in the presence of the jury is not necessarily judicial error. The rendering of an adverse ruling and the admonishment of counsel do not necessarily mean that a judge is being demeaning. While Ms. Meade may have subjectively felt that Judge Van Voorhis was somewhat stern with her, the comments were not made with any intent to embarrass Ms. Meade. Judge Van Voorhis' goal was to protect the fairness of the process.

Judge Van Voorhis acknowledged during the hearing that his comments were not appropriate, but that he was trying to maintain the fairness of the process. (RT 563:16-23; 773:19-20.) This conduct is at worst prejudicial misconduct because there is not clear and convincing evidence that Judge Van Voorhis remarks were made with any malicious intent or in bad-faith.

Although Judge Van Voorhis had discussed and issued a pre-trial in limine ruling, Ms. Meade ultimately violated the ruling. One reasonable inference was that the attorney was simply inexperienced and innocently misunderstood what could be done. Another reasonable inference was that the attorney intentionally violated the in limine order. Unfortunately, fifteen years of unsuccessfully trying to get lawyers to abide by rulings caused Judge Van Voorhis to experience feelings of frustration, and those feelings were immediately and inappropriately expressed. Judge Van Voorhis lost confidence that the attorney was trying to be fair. Judge Van Voorhis acknowledges that he failed to be patient, dignified, and courteous to the attorney, however, this cannot fairly be characterized as an act done for a

corrupt purpose or in conscious disregard of the limits of the judge's authority.

These facts do not support a finding of willful misconduct. Even though Judge Van Voorhis' comments were not appropriate, there must be clear and convincing evidence that the purpose of those remarks was to publicly embarrass the attorney. Poor demeanor or an eruption of temper, by itself, does not constitute willful misconduct if the judge continues to pursue the faithful discharge of judicial duties. It would have been better to have excused the jury, however there is no legal authority holding that the jury must be excused. The weight of the evidence was that not excusing the jury was an oversight as a result of becoming embroiled. Instead, the Commission found a corrupt purpose–to vent anger or frustration. The Commission relied upon the repetitive pattern of poor demeanor to prove the intentional bad-faith, which is speculation.

A spontaneous venting of anger or frustration cannot be bad-faith because it would essentially make any violation of Cannon 3B(4) willful misconduct. The Commission's finding of willful misconduct in this count must be reversed.

COUNT TWO A(5)

In Count Two A(5), a prosecutor attempted to introduce evidence regarding horizontal gaze nystagmus and characterized it as a sobriety test, creating the inference that it tested sobriety. The prosecutor created the unfair inference that the gaze nystagmus test was a sobriety test without qualifying anyone as an expert witness on its meaning. The prosecutor said that she just wanted present evidence of the test as an example of defendant's inability

to follow instructions. Judge Van Voorhis worried, "...that if you offer evidence of that, they are liable to think it means something." The probative value was substantially outweighed by the prejudicial effect. Inadmissible evidence had been presented in the trial. As long as the prosecutor was willing to stipulate that the test did not have meaning, then the prejudice could be cured by an immediate, special jury instruction. There was no authority saying that a judge could not order such a stipulation to be declared, especially where the prosecutor appeared agreeable to it. Judge Van Voorhis resorted to the quick remedy of saying to the prosecutor, "Tell them it does not mean anything." The judge admonished the jury to disregard the evidence of horizontal gaze nystagmus and polled them to assure compliance.

The question is what was the judge doing? The Special Masters found that the purpose was to humiliate the prosecutor. Based upon what evidence? Did the judge encounter a problem and go on trying to give a fair trial or was his purpose to harm the attorney in disregard of his role as a judge? What Judge Van Voorhis did has to be distinguished from secretly fixing a ticket for a best friend or calling an attorney a liar. His purpose was to cure the unfair inference created by the prosecutor. At its most fundamental level, that is not a corrupt purpose.

The conduct at issue in Count Two A(5) was not willful misconduct. By an objective standard this conduct was not in bad-faith. The purpose of the admonition from Judge Van Voorhis was to insure that the defendant enjoyed his constitutional right to a fair trial. In Judge Van Voorhis' opinion, the measures taken were not prohibited by California law and they were not extremely severe given the perceived error committed by the prosecutor and given

the need for effective, corrective action to reverse the prejudicial effect. Judge Van Voorhis was present in the courtroom, could observe the jury, and reasonably determined it was necessary to direct the prosecutor to admit that the horizontal gaze nystagmus test was meaningless in order to unquestionably eliminate the adverse inference erroneously created by the prosecutor. In a short amount of time, the jury overheard the discussion of the nature of the error. The objective perception was that the judge had stood up for fairness, not that there was a gratuitous attempt to embarrass the prosecutor.

The Court has the power to enforce and control order in proceedings before it, so requiring that an attorney address the jury is not necessarily bad-faith conduct. (See, e.g., Code of Civil Procedure section 128.)

Respondent respectfully submits that there is not clear and convincing evidence that Judge Van Voorhis engaged in bad-faith conduct with the intent to humiliate Ms. Brock as found by the Commission. (Decision, at p. 20.)

COUNT TWO A(6)

In Count Two A(6), Judge Van Voorhis was found to have forced the prosecutor to agree with his ruling, admit to the jury that evidence to which she was objecting was relevant, and confess to the jury that she made a mistake. The Special Masters found the attorney's version of the incident far more credible, despite the fact that the proceedings were transcribed by the court reporter. The judge's explanation that a special, two-step approach needed to be followed (RT 692:1-695:22) was deemed not credible by the Special Masters "... because the judge clearly badgered Ms. Brock into acquiescence." (Special

Masters' Findings of Fact and Conclusions of Law, page 40, lines 10-11.)

The question is what was the judge doing? Was he angrily forcing the attorney to agree with him? Was he acting without regard to whether his actions were legally permitted? Judge Van Voorhis testified that he asked her whether it was character evidence that was relevant in order to permit her to invoke section 352 of the Evidence Code as a further ground for objection if she wished. The attorney was completely non-responsive. She ignored the judge's question. The Special Masters rejected Judge Van Voorhis' testimony that he just wanted her to say something–anything–and he could move on. That's all that happened. She finally said, "Yes." And he just moved on. This wasn't willful misconduct. The finding of willful misconduct was based in large part on Ms. Brock's testimony regarding her subjective feelings. This is not the appropriate standard. Moreover, the finding of willful misconduct was also based upon the Special Masters' finding that Ms. Brock was required the make a confession to the jury. There is no evidence of any such confession to the jury in the record.

Judge Van Voorhis asked, "Sure it is, isn't it?" He was entitled to say, "Anything further?" and had he done so, he would have faced no discipline at all. What was stated by the judge doesn't prove by clear and convincing evidence that the judge was acting with no regard for whether his actions were legally permitted.

The Special Masters found that Judge Van Voorhis knew of no authority in California that permitted him to order a lawyer to confess her mistakes to the jury and must have known there was none. However, even obvious mistakes of law do not constitute willful misconduct. In

Vorse v. Sarasy (1997) 53 Cal.App.4th 998, the judge erroneously struck a defense witness's live testimony, because the judge concluded that the witness was lying. That judge should have known that no case had ever approved doing so. In another case, a judge failed to give the jury instruction on reasonable doubt, the burden of proof in a criminal case–an obvious error. That judge surely must have known that there was no legal authority for leaving out that instruction. But these types of negligent mistakes do not constitute willful misconduct. In Broadman v. Commission (1998) 18 Cal.4th 1079, at 1092, the Supreme Court stated that "... mere negligence cannot satisfy the bad faith element of willful misconduct in office" and the concept of "should have known" was disapproved by the Supreme Court.

There is not clear and convincing evidence of willful misconduct by Judge Van Voorhis. The finding of willful misconduct is based upon the Commission's finding that Ms. Brock was required to make a "confession to the jury" and there is no evidence of any such confession to the jury in the record. (Decision, at p. 23.)

COUNT TWO B(1)

Count Two B(1) involves an allegation that Judge Van Voorhis had a temper tantrum that included throwing files, and reduced a temporary clerk, Kim Carmichael, to tears. (Decision and Order, at p. 28.) The contention that Judge Van Voorhis had a temper tantrum that included "throwing files" is not supported by clear and convincing evidence. This is an unfair characterization that exaggerates the incident into something more than it is. Not one witness described the judge's conduct as a "temper tantrum."

Kim Carmichael's testimony is illustrative:

"A. He had the files and he tossed them over to the ledge; they fell off the ledge onto my desk. At that point he said, 'I have no bodies. I have these files. What's going on?'" (RT 149:7-10.) Ms. Carmichael did not testify that Judge Van Voorhis threw the files over the ledge of the bench and that they came down on her. Ms. Carmichael in fact did not testify that Judge Van Voorhis threw the files. Her testimony was that he tossed them over to the ledge of the bench and the files then fell off the ledge onto Ms. Carmichael's desk.

When he testified, Judge Van Voorhis tried to explain that he thought it was unfair that no one told him that he was accused of throwing files until years later and so he can't remember the incident. The Special Masters thought Judge Van Voorhis confessed to throwing the files. They took a phrase completely out of context and gave it a speculative, subconscious, "Freudian slip" significance, even though the Judge was saying exactly the opposite thing at the time.

Judge Van Voorhis' testimony on this issue is set forth below (RT 782:10-785:4):

> Q. I believe you testified that you do not recall whether the files fell on her desk; correct?
>
> A. I cannot swear 100 percent whether they did or not. You know, in the time that I've been there, there have been times with my regular clerk, Jan, and maybe my substitutes where, you know, a file fell. How many times in 15 years? Maybe like five times.
>
> So it would be the kind of thing where I wouldn't necessarily remember it, but it's

also the kind of thing where it would strike me as out of the ordinary and unusual, so I might remember it.

But that's the category I put it in. I can't be 100 percent sure what happened with those files.

Q. If I –

A. If it fell, it was accidental. Believe me.

Q. If I recall your testimony on this, I believe you said that the reason you could not recall whether they fell is that they did not tell you whether it was alleged, is that right?

A. Well, due to the passage of time, I'm – you know, my memory of whether the files fell or not is just – it's just not there. There's no memories I can call upon to picture what happened to those files when they went on that table.

Q. Did I state your testimony correctly, that the reason that you could not recall whether or not the files fell was that they did not tell you it was alleged?

A. It sounds like it. It sounds like what I said, if that's what I'm being tested for, for remembering what I said yesterday.

Q. Do you doubt that now is your testimony?

A. What is important is to hear what I'm saying to you now. And that is that, because of the passage of time, I no longer have a memory that I can picture that gives me the answer to whether or not the files fell or not.

And I – you know, I attribute that to the passage of time. Because I know that at the instant that I threw the files – human beings looking in that direction are going to have, you know, the ability to perceive it. Wherever that memory cell goes – I'm not a psychiatrist. I can't tell you.

But I have the feeling that the passage of time puts them somewhere else in your head where you can't get at them. And this one I can't get at anymore. And maybe I could have if somebody had just told me a little bit sooner what this was about.

Q. You just said at the moment you "what" the files?

A. At the moment the files went onto that tabletop and then they fell. You know, assuming they fell, that where they fell off – what the brain does is like store in memory. Every – I'm thinking that everybody sees and remembers stuff, but it goes somewhere in the brain. I'm no psychiatrist. That's my understanding.

Q. Did you just say, "At the moment I threw the files"?

A. I don't remember. If I did, I misspoke. I'm extremely nervous.

Q. Okay.

A. What I'm saying is that, if I had a recollection of throwing the files, you know, I could call upon it. But if you wait two years and then say, "Okay, remember

> throwing the files," that memory cell isn't going to be there in most people.
>
> And I can't explain the phenomenon. But I told Mark Simons what I thought this was about. And when he didn't write back to me what this was about, now I'm in a worse position to defend myself in front of these people (indicating).

Reading into this testimony that Judge Van Voorhis subconsciously admitted throwing files weakens our fact finding system. When he tried to communicate, the three judges listening took something completely out of context and turned it into exactly the opposite of what he was saying. It was extremely unfair to do so. The Findings of the Special Masters and the Commission should not have relied upon such a speculative inference where clear and convincing evidence was the test.

COUNT TWO B(2)

Count Two B(2) involves an allegation that Judge Van Voorhis unfairly berated an experienced clerk (Pat Van Horn) in open court for swearing in a bailiff in the customary manner. (Decision and Order, at p. 28.) This allegation was not supported by clear and convincing evidence and the Commission's determination that this was prejudicial misconduct must be reversed.

In particular, Ms. Van Horn's testimony was contradictory and should not have been given any weight by the Masters or the Commission. Ms. Van Horn testified on direct that after she swore the bailiff on the record, Judge Van Voorhis told her that she had wasted 20 seconds of the court's time by swearing the bailiff on the record.

(RT 162:16-20.) Judge Van Voorhis seemed upset when he said this to Ms. Van Horn. (RT 162:21-24.) Ms. Van Horn also testified on direct that Judge Van Voorhis told her that "they had a manual in [his] department and the manual would explain the correct way to do that procedure." (RT 163:5-9.) Significantly, during cross-examination, Ms. Van Horn retracted this statement and testified that Judge Van Voorhis merely stated that Ms. Van Horn "needed to read the manual." (RT 184:2-5.) In yet another contradiction, Ms. Van Horn filed a written complaint with the court alleging that Judge Van Voorhis' courtroom was an unsafe work environment for her. In her complaint, Ms. Van Horn did not say that Judge Van Voorhis accused her of being unfamiliar with or violating the department clerk's procedural manual and she erroneously contended that the incident occurred in the presence of the bailiff and the jury. (RT 180:18-181:10, referencing Respondent's Exhibit 24; RT 183:18-19.)

Judge Van Voorhis objects to the inclusion of testimony from Ms. Van Horn regarding her subjective feelings about how the incident made her feel physically and emotionally. (Decision, at p. 26.) Ms. Van Horn's subjective feelings are irrelevant because the standard for evaluating judicial conduct is an objective standard.

The Commission should not have credited the testimony of Ms. Van Horn and Mr. Markowitz over Judge Van Voorhis' testimony. (Decision, at p. 26.) Judge Van Voorhis testified that he was 100% certain that he did not tell Ms. Van Horn that she wasted 20 seconds of his time because he was later advised that Ms. Van Horn was upset that day by Mindy Morgado, and Judge Van Voorhis subsequently prepared notes of his conversation with Ms. Van Horn. (RT 652:7-10; 653:2-5.)

The allegations of Count Two B(3) were not supported by clear and convincing evidence and must be reversed.

COUNT TWO B(3)

Count Two B(3) involves an allegation that Judge Van Voorhis publicly humiliated a deputy sheriff in court. (Decision and Order, at p. 28.) This allegation was not supported by clear and convincing evidence and the Commission's determination that this was prejudicial misconduct must be reversed.

Judge Van Voorhis did become upset with Deputy Brown, but the reason he became upset with her should have be included in the findings. Judge Van Voorhis made the remarks at issue because he is responsible for maintaining a very large criminal calendar that requires strict adherence to courtroom protocol and guidelines in order to insure the orderly administration of justice. As of December 26, 2000, the established procedures followed by the Sheriff's Department for supplying defendants to Department 24 required that in the early morning, a member of the Sheriff's Department, specifically the security deputy, would have the responsibility to cross-check the names on the calendar for Department 24 supplied by the clerk's office with the names of the anticipated defendants being transported to court in order to assure that there was a match and to alert the Judge either verbally or in writing before 8:30 a.m. if there was not a match as to any name. (RT 636:1-637:18.) Over the years, a concerted effort had been made to get the Sheriff's Office to coordinate their production of incarcerated defendants with court-ordered appearances. (RT 632:7-24.)

The established procedure has two distinct advantages. First, it avoids the public embarrassment and humiliation of

the judge having a file without a defendant or having a defendant without a file, which could give the public the impression that the judge was uninformed, ineffective, inefficient, and incompetent. (RT 630:9-632:6.) Second, notifying the judge of the problem also gives the judge the opportunity to assess the situation and to make decisions about the best way to respond to that situation. (RT 630:9-632:6.) The judge is in the best position to evaluate, for example, whether the defendant should be transported on an expedited basis, or whether to postpone the hearing to another day. (RT 630:9-632:6.) Usually, that determination needs to be made as soon as possible in the morning in order to have the most options available and to minimize the inconvenience to those affected, potentially jurors, lawyers, witnesses, court staff and Sheriff's Department personnel. (RT 630:9-632:6.) The goal is to protect the right of the defendant to have her day in court. (RT 647:20-22.)

Deputy Brown did not follow the established procedure on December 26, 2000. When the case was called, Deputy Brown only told Deputy La Fortune that an in-custody defendant on the court's calendar was not coming to court. The statements made by Judge Van Voorhis related to this issue, i.e., the need for the Deputy to learn and follow the well-established procedures that were already in place. There was a long history of the Sheriff's Department not transporting prisoners. (RT 632:7-24.) The more experienced courtroom deputy needed to be directed to confer with the temporary security deputy so that the judge would know whether there were other problems and know how to solve that particular one. (RT 649:10-11)

The remarks made by Judge Van Voorhis should have been better stated. However, the genesis of those remarks

arose from Judge Van Voorhis frustration with the inability of the sheriff's department to properly transport prisoners. This frustration does not justify the conduct, but it does help explain the conduct.

COUNT TWO (C)

Count Two(C) involves an allegation that Judge Van Voorhis was unnecessarily disparaging and embarrassing to a jury foreperson. (Decision and Order, at p. 30.) This allegation was not supported by clear and convincing evidence and the Commission's determination that this was prejudicial misconduct must be reversed. Significantly, Commission member and appellate justice Vance Raye did not believe that Judge Van Voorhis' comments to the jury constituted misconduct. (Decision, at p. 55.)

Judge Van Voorhis testified that he did not intend to be rude to the jurors and that he offered his apologies to the masters during the hearing for not anticipating how his remarks might be construed as ridicule. (RT 416:18-23; 421:21-22; 422:2-4.) Judge Van Voorhis felt he needed to explain why the jury was being brought out on this particular occasion to hear his oral answer to the jury's written question (as opposed to the previous three questions when the answers were given in writing) and then he decided on the spur of the moment to tie the necessity of bringing out the jury to the imprecision of the question. (RT 426:18-25.)

Judge Van Voorhis did not intend to demean or belittle the jury. He intended to emphasize the importance of precise questions that would eliminate uncertainty. (RT 421:21-22; 422:2-6.)

In mitigation, Mr. Gardner testified that in the Silva case Judge Van Voorhis appeared to be very courteous with

the jury and that "they have sort of like a very strong love affair, sort of." (RT 455:16-23.) In the Gotchall case, as another example, Judge Van Voorhis was careful to protect the rights of both parties and the physical health of a juror in determining in the middle of trial whether a juror with a back injury could continue with the trial. (See, Respondent's Exhibit 3.)

D. The Level Of Discipline Imposed Upon A Judge Should Not Be Affected By An Unsuccessful Defense Before The Special Masters.

The Commission identified five considerations that were relevant to the level of discipline imposed in this case. Two of these considerations are: Whether the judge appreciates the inappropriateness of his actions; and, whether the judge is likely to engage in unethical conduct in the future. (Decision, at p. 31.) Both of these considerations are extremely unfair for use as an element in the level of discipline imposed.

First, the Commission essentially found that Judge Van Voorhis did not appreciate the inappropriateness of his actions because he offered evidence to defend his conduct. The Masters either did not credit this evidence or did not give it much weight. As a fact-finder, that is their role. However, for the Commission to then make a finding that Judge Van Voorhis does not appreciate the nature of his misconduct because he unsuccessfully contested the allegations in the Notice of Formal Proceedings is remarkably unfair. Judge Van Voorhis has an unquestioned right to contest the charges made by the Commission and he should not be punished for exercising that right.

Similarly, the Commission reasoned that because Judge Van Voorhis contested the charges, that he is not remorseful for his conduct and it is "close to a certainty" that Judge Van Voorhis will reoffend. (Decision, at p. 44.) The Commission then unjustly placed the burden on Judge Van Voorhis to produce "evidence that he appreciates how the Masters and the Commission could find misconduct." (Decision, at p. 44.) There is no better illustration of the impossible situation in which the Commission places a respondent judge. Under this scenario, a respondent judge is required to both deny that the allegation is accurate, and then also produce evidence that he is genuinely remorseful in the event that the Masters eventually resolve factual issues against him. All of this must occur in the same hearing which is incredibly prejudicial to the defense. It is simply not credible to mount a defense to allegations of misconduct when the Commission also expects the judge to produce evidence that he appreciates the nature of the misconduct in the same hearing. It is inherently contradictory.

E. Due Process Requires A Dispositional Hearing Prior To The Imposition Of Discipline.

The Commission rules do not provide for a mandatory dispositional hearing after a finding of misconduct by the Masters. However, the Commission rules are clear that the issue of discipline is not before the Masters so there is no forum in which Judge Van Voorhis could fairly present evidence bearing on the appropriate level of discipline. In cases where the allegations of misconduct are disputed, dispositional evidence cannot reasonably be placed before the Masters. Not only is such evidence irrelevant because it relates to discipline, but it is extremely prejudicial to the

respondent judge's effort to defend against allegations that are contested.

Compounding the problem, there is no mandatory procedure for the Commission to hear evidence of an appropriate disposition from the judge. There is a discretionary provision in the Rules. (Rule 133.) On March 3rd, 2003, Judge Van Voorhis invoked this provision and made a written request to submit additional evidence pursuant to Rule 133, but that request was denied without explanation. This denial is a violation of due process.

Among other things, Judge Van Voorhis intended to offer evidence that he presided over 64 jury trials without incident in the last 18 months and that he was handling things better. (See, Decision, at footnote 65.) The Commission refused to consider this evidence because it was not in the record. For the reasons discussed above, it would be manifestly unfair to have required Judge Van Voorhis to submit this evidence during the hearing before the Masters because it is in effect a concession that the allegations are true, which was disputed in important respects. If dispositional evidence must be presented initially before the Special Masters, it makes it very difficult for a judge to realistically confine character evidence when litigating the charges.

VII. CONCLUSION

The Commission's order of removal is unduly harsh and is not justified by the factual findings. The misconduct here does not involve corruption, moral turpitude or dishonesty. Removal of Judge Van Voorhis will not serve to protect the public. In balancing the misconduct found here against the goal of protecting the public, and given the

favorable testimony of the several experienced attorneys that regularly appear before Judge Van Voorhis, removal would in fact be harmful to the public because it would deprive the public of a judge that several attorneys (civil and criminal) uniformly believe is a thoughtful, objective, hard-working and intelligent judge.

While Judge Van Voorhis was disciplined in 1992 for demeanor misconduct, there is no evidence that Judge Van Voorhis has engaged in a pattern or practice of demeanor misconduct since that time. In fact, approximately eight years elapsed between the prior discipline imposed and the misconduct found by the masters in this instant matter. Judge Van Voorhis has been working to control his demeanor and was successful for approximately eight years. Contrary to the decision of the Commission, this is not evidence that Judge Van Voorhis is unwilling or unable to reform. This is evidence that Judge Van Voorhis has worked to project an appropriate demeanor, but was unsuccessful in a few instances during late 1999 and 2000.

Judge Van Voorhis remains willing and able to offer evidence that he has successfully presided over a busy calendar and has handled things better over the last eighteen months before his removal. The Commission's decision should be reversed and this matter should be remanded so that Judge Van Voorhis can present this relevant and important dispositional evidence.

Furthermore, Judge Van Voorhis readily acknowledged during the evidentiary hearing that he should not have made some of the comments he d*id.* With respect to these comments, which were made in the heat of the moment, it has been recognized that a judge must be permitted some leeway in handling difficult attorneys: "Trial judges confronted with disruptive, contumacious, stubbornly

defiant [attorneys] must be given sufficient discretion to meet the circumstances of each case." (In Re Buckley (1973) 10 Cal.3d 237, 253-254, fn. 21.) Again, while this does not justify using a harsh or sarcastic tone, this Court has recognized that judges must be given some latitude to handle attorneys in the heat of the moment.

Even in the absence of the additional dispositional evidence that Judge Van Voorhis intends to offer, a public censure is the strongest appropriate sanction for the misconduct at issue. The misconduct is purely demeanor misconduct. None of the allegations charged or factual findings in any way arise from any personal corruption or gain on the part of Judge Van Voorhis. Judge Van Voorhis has an unquestioned zeal to dispense justice in a fair and efficient manner. It is undisputed that Judge Van Voorhis is a hard-working and dedicated jurist.

Attorney Barry Burak perhaps said it best when he testified that he finds Judge Van Voorhis to be one of the hardest working, brightest and efficient judges on the bench. (RT 530:14-20.)[4] Mr. Burak has never seen Judge Van Voorhis make intentionally wrong rulings or exhibit bias toward one party or another, including the prosecutor. (RT 531:14-17.) According to Mr. Burak, "I can tell you that he is a good judge. We need good judges." (RT 535:17-18.)

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[4] Attorney Barry Burak has been a licensed criminal defense attorney for over thirty years. (RT 529:4-11.) He maintains an office in Contra Costa County. (RT 529:12-14.) Mr. Burak has conducted between 300 and 400 jury trials. (RT 530:2.) He has tried approximately a dozen jury trials, one or two court trials and probably appeared over hundred times in Judge Van Voorhis courtroom. (RT 530:6-10.) Mr. Burak is present in Judge Van Voorhis courtroom on a weekly basis. (RT 530:11-13.)

It is respectfully submitted that removal is not justified and is an unreasonably harsh and inappropriate sanction in this matter. The Commission's Decision and Order of Removal must be reversed and this matter remanded to the Commission for an appropriate disposition.

Dated: January 15, 2004

MURPHY, PEARSON, BRADLEY & FEENEY

By /s/
James A. Murphy, Esq.
Harlan B. Watkins, Esq.
Attorneys for BRUCE VAN VOORHIS

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CERTIFICATE OF WORD COUNT
(California Rule of Court Rule 14.1(c)(1))

The text of this brief consists of 16,145 words, including footnotes, as counted by Microsoft Word 2000 which was used to generate this brief. This brief is filed concurrently with an application for permission to file a brief in excess of 14,000 words which is supported by the Declaration of James Murphy, Esq.

Dated: May 23, 2003

MURPHY, PEARSON, BRADLEY & FEENEY

By /s/_____
James A. Murphy
Attorneys for BRUCE VAN VOORHIS

HBW.10173858.doc

EXHIBIT A

COMMISSION ON JUDICIAL PERFORMANCE
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102

Contact: Victoria B. Henley
Director-Chief Counsel
(415) 557-1200

FOR RELEASE
February 27, 2003

JUDICIAL PERFORMANCE COMMISSION ISSUES ORDER REMOVING JUDGE BRUCE VAN VOORHIS FROM OFFICE

The Commission on Judicial Performance has issued a decision and order removing Judge Bruce Van Voorhis of the Contra Costa County Superior Court from office. The Commission's determination becomes final in 30 days, subject to discretionary review by the California Supreme Court.

The decision and order is available on the Commission's Web site at www.cjp.ca.gov (under "Press Releases" and "Public Discipline – 1960 to Present") and at the Commission's office.

* * *

The Commission is composed of three judges, two lawyers, and six public members. The Chairperson is the Honorable Risë Jones Pichon of the Santa Clara County Superior Court in San Jose.

For further information about the Commission on Judicial Performance, see the Commission's Web site.

FILED
FEB 27 2003
Commission on
Judicial Performance

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

RECEIVED
FEB 28 2003
By: /s/_____

Inquiry Concerning Judge Bruce Van Voorhis No. 165	DECISION AND ORDER REMOVING JUDGE VAN VOORHIS FROM OFFICE

This disciplinary matter concerns Judge Bruce Van Voorhis, a judge of the Contra Costa County Superior Court. The Notice of Formal Proceedings charged Judge Van Voorhis with eleven incidents of unethical conduct.

The commission agrees with the special masters that all eleven charges are supported by clear and convincing evidence. The commission concludes that four of Judge Van Voorhis's acts constitute willful misconduct, that the remaining seven constitute acts of conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and that these proven charges constitute a pattern of misconduct similar in nature to the misconduct for which Judge Van Voorhis was previously publicly reproved. Judge Van Voorhis's misconduct not only brought the judicial office into disrepute, but threatened to interfere with the actual administration of justice. Furthermore, the commission finds that Judge Van Voorhis

does not appreciate the inappropriateness of his conduct and the commission concludes that Judge Van Voorhis would again violate the California Code of Judicial Ethics, if allowed to remain on the bench. For the reasons more fully set forth in this decision, the commission hereby removes Judge Bruce Van Voorhis from the bench.

PROCEDURAL HISTORY

Judge Van Voorhis was elected as a judge of the Contra Costa County Municipal Court and took office on January 5, 1987. On September 8, 1992, the commission publicly reproved Judge Van Voorhis for a number of instances of misconduct including ex parte communications, improper questioning of potential jurors, interrupting the proceedings in an adjoining courtroom, and giving directions to staff in a manner which was perceived as harsh. On February 1, 1994, the commission privately admonished Judge Van Voorhis for issuing subpoenas in his own dissolution case.

Judge Van Voorhis was elevated to the Contra Costa County Superior Court on June 8, 1998, as a result of the consolidation of the courts.

In May 2001, the commission sent a preliminary investigation letter to Judge Van Voorhis. Following his response, a Notice of Formal Proceedings was filed on December 17, 2001. Judge Van Voorhis filed his verified answer on January 2, 2002.

On January 25, 2002, the Supreme Court, in response to the commission's request, appointed three special masters. An evidentiary hearing was held from March 24 through March 27, 2002 in San Francisco, California before the special masters: Justice Thomas Hollenhorst of the Court of Appeal, Fourth Appellate District, presiding; Justice Kenneth Yegan of the Court of Appeal, Second Appellate

District; and Judge Thompson Hanks of the Superior Court of Riverside County. Mr. Jack Coyle and Mr. Brad Battson of the commission's Office of Trial Counsel presented the case in support of the charges. Judge Van Voorhis was represented by Mr. James A. Murphy and Mr. Harlan B. Watkins of Murphy, Pearson, Bradley & Feeney of San Francisco, California. On September 6, 2002, the masters submitted their 64-page report to the commission.

Following the receipt of objections and briefs from Judge Van Voorhis and the Office of Trial Counsel, the matter was argued before the commission on December 4, 2002. Mr. Coyle presented argument on behalf of trial counsel. Judge Van Voorhis spoke on his own behalf and was represented by Mr. Murphy.

FINDINGS OF FACT & CONCLUSIONS OF LAW

A. Count One

1. Findings of Fact

Judge Van Voorhis presided over a jury trial in *People v. Elze* in Walnut Creek from January 30 to February 1, 2001. Mr. Elze was charged with driving under the influence of alcohol. Deputy District Attorney Stacey Brock prosecuted the case and Timothy Gomes, a private attorney, was defense counsel. At the time of the trial, Ms. Brock had been an attorney for approximately three months.

One of the issues in the case concerned statements that Mr. Elze had made to the police. Police officers in a marked patrol car were driving behind Mr. Elze on an on-ramp to a major highway. Mr. Elze stopped very abruptly, and the officers had to slam on their brakes to avoid rear-ending him. The officers found this to be unusual. They

followed Mr. Elze for a while and he was driving slowly. They then put on their lights and siren to pull Mr. Elze over. He was very slow to pull over. The officer approached Mr. Elze on the right side to avoid traffic, and asked him some questions such as why he braked so abruptly. The officer smelled alcohol and asked Mr. Elze whether he had been drinking. The questions were asked before the field sobriety tests were administered and while Mr. Elze was still in his car.

Attorney Gomes filed a written motion in limine to exclude Mr. Elze's statements on the theory that they were elicited in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. Although the written motion sought to exclude all statements made from the time of Mr. Elze's "detainment," the pretrial oral argument focused on the admissibility of the pre-field sobriety test statements. Ms. Brock sought to introduce these statements. Judge Van Voorhis ruled that the pre-field sobriety test statements could not be introduced and warned Ms. Brock that introduction of the statements could lead to reversal, but noted that she could use the statements for impeachment should the defendant testify. Ms. Brock did not introduce the statements, but they were admitted during Mr. Elze's questioning by his own counsel.[1] Mr. Elze was convicted.

After sentencing, Judge Van Voorhis remained on the bench and gave Ms. Brock an assessment of her performance. He told her that she had done well during the

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[1] Ms. Brock sought to introduce evidence that Mr. Elze initially stated, "All I had to drink was coffee and water," hut then stated he had been drinking "brandy and 7-Up." Mr. Elze later testified that he told the police he had been drinking "brandies and seven" and admitted having had two brandies and an Irish coffee.

trial, but he also told her that as a young lawyer, she had to be prepared for an unanticipated ruling by a judge and that she needed to be able to adjust her strategy of attack. Ms. Brock and two other district attorneys, who were present in the courtroom, testified that Judge Van Voorhis stated that he knew that Mr. Elze's statements were admissible, but that he kept them out to see how Ms. Brock would handle herself. Judge Van Voorhis testified that his statements were taken out of context and denied that he intentionally made a wrong ruling in order to see how Ms. Brock would react.

The masters, having weighed the evidence of all the witnesses, credited the testimony of the district attorneys and found that Judge Van Voorhis, by his comments, gave the appearance of having decided a legal issue to teach a new lawyer how to handle adversity. The masters, however, also found that "[g]iven the poor quality of the briefing by opposing counsel, the poor quality of the record which was not developed in a pretrial evidentiary hearing, and the lack of any intelligent analysis by the parties or Judge Van Voorhis, we cannot find, as of the time of the ruling, he deliberately made an erroneous ruling."

The commission adopts the masters' finding that Judge Van Voorhis by his comments gave the appearance of having decided a legal issue to teach a new lawyer how to handle adversity. The commission notes that even at the evidentiary hearing before the masters, Judge Van Voorhis failed to appreciate how his choice of topics, "unexpected results," implicitly suggested that his ruling was questionable, if not wrong. In addition, he testified before the masters:

> The other two walked in the room, and I started talking to her about how unexpected results can happen in a trial. And you know, I expressed to her that – and I can't remember the exact words. But on the face of it, she should have expected a victory and that I knew that, in a case of detained motorist, you're not entitled to Miranda warnings and any of the admissions that you make are admissible but that she failed to consider the unexpected result and instead, you know, decided to pursue on this battlefield.

This statement by Judge Van Voorhis, like his statement to Ms. Brock, gives the clear appearance that he knew that the defendant's statement was admissible.

2. Conclusions of Law

Prejudicial conduct is "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office."[2] "The provision that the conduct must be that which 'brings the judicial office into disrepute' does not require actual notoriety, but only that the conduct, if

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[2] *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1092 (*Broadman*), citing *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 312 (*Doan*).

known to an objective observer, would appear to be prejudicial to public esteem for the judicial office."[3]

The "public esteem for the judiciary" aspect of prejudicial misconduct is measured by an "objective observer" standard. This aspect is established when it would appear to an "objective observer" familiar with the facts and the standards of conduct that the conduct in question is prejudicial to public esteem for the judicial office.[4] The views of actual observers are sufficient, but not necessary, to establish judicial misconduct under an objective observer standard.[5] The judge's intent and motivation "is not a significant factor in assessing whether prejudicial conduct has occurred under this standard."[6]

The commission concludes that Judge Van Voorhis's comments in court after the sentencing violated canons 1 and 2A of the Code of Judicial Ethics and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Judge Van Voorhis, by commenting to the prosecutor on her reaction to his questionable ruling to exclude Mr. Elze's pre-field sobriety test,[7] violated canon 1 by failing to observe "high standards

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[3] *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878 (*Adams*), citing *Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284 (*Geiler*).

[4] *Doan, supra*, 11 Cal.4th 294, 312.

[5] *Id.* at p. 325.

[6] *Adams, supra*, 10 Cal.4th at p. 878, citing *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 376 (*Gonzalez*).

[7] A review of the transcript of the trial and the transcript of the hearing before the masters suggests that Judge Van Voorhis knew that his ruling was problematic. When the prosecutor cited the leading case, *Berkemer v. McCarty* (1984) 468 U.S. 420, in the argument on defendant's motion in limine, Judge Van Voorhis responded, "I don't have to tell you which case controls or not." Before the masters, Judge Van Voorhis testified that he excluded the testimony because he

of conduct. . . so that the integrity and independence of the judiciary will be preserved." The judge also violated canon 2A by failing to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. As noted by the masters, to the "objective observer," Judge Van Voorhis's statement "that he made a ruling for the purpose of seeing how the prosecutor would handle it, was prejudicial to public esteem for the judicial office."

B. Count Two A(1)

1. Findings of Fact

Judge Van Voorhis presided over *People v. Silva*, a criminal case tried before a jury on June 1 and 2, 1999. Ms. Silva was charged with possession of methamphetamine with intent to sell. The prosecutor was Deputy District Attorney Dana Filkowski and Ms. Silva was represented by William Gardner, a private attorney. The masters found that Mr. Gardner was physically unkempt and did not appear ready for trial. He had no paper on which to take notes during the trial and had to borrow a tablet from the prosecutor.

During the course of trial, Mr. Gardner attempted to present a third-party culpability defense based on the arrest of another person the day before the search warrant was executed at Ms. Silva's residence. Mr. Gardner, however, had no witnesses or admissible evidence to present on the issue of third-party culpability.

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thought Mr. Elze was subject to arrest for evading the officers and the officer didn't ask Mr. Elze whether he had been drinking. The record, however, indicates that Mr. Elze, either voluntarily or in response to the officer's question, stated that he had "two brandies and an Irish coffee." There is nothing in the record to indicate that the police officer thought Mr. Elze was subject to arrest for evasion.

A discussion ensued between Judge Van Voorhis and Mr. Gardner in front of the jury. In a dialogue that extended for 13 pages of transcript, Judge Van Voorhis became increasingly exasperated by counsel's ineptness. The prosecutor serially objected to questions poorly framed by defense counsel. The judge was critical of Mr. Gardner's questions, Mr. Gardner appeared to be confused, and Judge Van Voorhis became increasingly aggressive toward Mr. Gardner. When it became clear that the jury seemed more interested in the exchange between the court and Mr. Gardner, the prosecutor asked the court to complete the discussion outside the presence of the jury. Judge Van Voorhis responded, "That won't be necessary."

The masters noted that "[d]uring this exchange, the judge interjected a lengthy series of questions and comments about Mr. Gardner's cross-examination that disparaged his professional competence. The prosecutor saw that the judge was making Mr. Gardner look 'somewhat pathetic' and became concerned that the jury might take pity on Mr. Gardner. Partly for that reason, the prosecutor stated, 'Your Honor, please. May we do this outside the presence of the jury?'"

Judge Van Voorhis ignored the prosecutor's request and continued to disparage Mr. Gardner.[8] The masters found that Judge Van Voorhis raised his voice and his tone was condescending, disrespectful and contemptuous. They noted that when "the judge made his statements about law

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[8] Judge Van Voorhis made statements such as, "That's not the way to prove a case in criminal court. Didn't you learn that in law school?"; "You learned what hearsay was in law school"; and "Now you need to ask him the question that you learned in law school is a legitimate question."

school, his eyes got very wide, he leaned forward in his chair, and gestured with his hand adding to the aggressiveness of the encounter."

The exchange took place in front of the jury with the risk of having the jury decide the case based on nonevidentiary reasons, The masters noted, "that even when the judge's attention was drawn to the fact that [the] jury was listening to offers of proof and witnessing repeated hostility toward defense counsel, the judge refused to continue the discussions at sidebar thus ignoring the prejudicial effect of his conduct." Judge Van Voorhis's explanation for not excusing the jury was that "they would attach significance to what they weren't hearing as much as they would attach to what they were and. . . start speculating about what they did and didn't hear." The masters noted that the judge admitted that his approach "enabled the defense attorney to place in front of the jury inadmissible evidence,' and that 'a skillful judge would have called a recess." The commission adopts the masters' findings of fact on Count Two A(1).

2. Conclusions of Law

The masters concluded and the commission agrees that Judge Van Voorhis's comments to Mr. Gardner constitute prejudicial misconduct. It would have appeared to an "objective observer" familiar with the facts and the standards of conduct that the judge's comments to Mr. Gardner about his law school education were prejudicial to public esteem for the judicial office.

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C. Count Two A(2)

1. Findings of Fact

Judge Van Voorhis presided over a jury trial on August 12 and 13, 1999, in People v. Gotchall. M±. Gotchall was charged with driving while under the influence of alcohol, resisting arrest and driving on a suspended driver's license. Deputy District Attorney Kathleen McMurray prosecuted the case and Mr. Gotchall was represented by David Larkin, a private attorney.

During the course of the prosecution's case, Ms. McMurray attempted to introduce evidence of the results of a field sobriety test known as the horizontal gaze nystagmus test. The masters explained that the "theory of this test is that when an officer places a finger in front of a suspect and has the suspect follow the finger with his eyes, the eyes will begin to bounce if there is intoxication." Prior to introducing the results of the test, Ms. McMurray asked the arresting officer to describe the test. Ms. McMurray had tried another driving while under the influence of alcohol case before another judge and believed the evidence to be admissible. No in limine motion had been filed prior to trial to exclude the test.

During Ms. McMurray's preliminary questioning of the arresting officer, Judge Van Voorhis sustained an objection to the admission of evidence of Mr. Gotchall's performance on the test. Judge Van Voorhis told the prosecutor that she needed to be able to lay a foundation for the evidence to be submitted to the jury, and that she would need an expert witness who would testify on the topic. Ms. McMurray told Judge Van Voorhis that she had not subpoenaed an expert. The prosecutor stated that she believed the officer could testify about the administration of the test, and that she did

riot believe that she needed to produce a separate expert witness.

Judge Van Voorhis did not agree with Ms. McMurray, and he continued, as the masters found, "in a condescending and somewhat hostile tone" to ask: "Now we have opened the door to something that really you have no intention of completing. Do we leave the jury with these half-truths?" Although Judge Van Voorhis told the masters that this statement did not necessarily impugn Ms. McMurray's motives in front of the jury, the masters emphatically disagreed, finding that in the context in which they were spoken, the fair import of the court's comments was that counsel was acting inappropriately and perhaps unethically.

After disparaging counsel, Judge Van Voorhis proceeded to disparage the prosecutor's case by noting that although the officer had seen "a person demonstrate some sort of a symptom," this didn't necessarily connect it to alcohol. The judge continued: "Probably everybody she has ever arrested has a smaller finger on the end of their hand. That doesn't mean that everybody with a small finger is drunk."

When the prosecutor attempted to move the proceedings along, Judge Van Voorhis responded, "That really doesn't solve the problem completely, because you went down a road that you could not complete, and now this jury has heard about gaze nystagmus, and they are supposed to wonder what it all means." Ms. McMurray asked to approach the bench to reach a resolution outside the presence of the jury. The masters found that Judge Van Voorhis "with a smirk on his face, replied, in a condescending and mocking tone," "And what would you tell me up here?" The prosecutor replied that she had

questions for the court, and Judge Van Voorhis told her "ask me now."

Judge Van Voorhis then conducted a lengthy colloquy critical of Ms. McMurray.[9] The masters found that the

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[9] The masters' report cites the following exchange.

MS. McMURRAY: If this was in the police report, and I indicated there was no motion indicating that this was to be excluded from this trial –
JUDGE VAN VOORHIS: Let me interrupt. Case law says you can prove gaze nystagmus if you can bring an expert who can show a jury that it has some scientific basis, and you told me you are not prepared to do that.
MS. McMURRAY: Not at this time.
JUDGE VAN VOORHIS: So then you have no business even going into the topic because you can't complete it. You can't show that it's reasonable. And so even going down that road is wrong because you know that you're not going to finish going down that road.
MS. McMURRAY: No, your Honor,
JUDGE VAN VOORHIS: And you leave the jury with half the information they need in order to use that information.
MS. McMURRAY: It was not my intention to do that, Your Honor. I have qualified officers in prior trials in different courts to testify on gaze nystagmus, so it wasn't my intention to start something that I could not finish. This is the first time I've had a Court –
JUDGE VAN VOORHIS: They are usually not in a position to tell us what it means. They can only tell us what their experience has been. But, like I say, it's like the little finger. It doesn't necessarily mean they are right.
MS. McMURRAY: Fine.
. . .
JUDGE VAN VOORHIS: And she is not in a position to know what experts say about this and what the field says about it. She only knows her own opinion about it.
MS. McMURRAY: If I can ask her her own opinion about it, that's
JUDGE VAN VOORHIS: No more admissible than her opinion about a little finger. It could be entirely coincidental, and you need to show it's based upon the logic. How will we ever get there? The eyeballs do

something, and this jury is supposed to assume that magically the officer can tell that it means something? ¶ And you are leaving them with the impression that the officer can and that you think this can be done, and I don't – I just don't think you ought to go there unless you are going all the way there.
MS. McMURRAY: If that's the Court's opinion –
JUDGE VAN VOORHIS: I've seen this before many times.
MS. McMURRAY: I have never heard of it.
JUDGE VAN VOORHIS: If you do gaze nystagmus, you have to have an expert. That's what the Court of Appeals [*sic*] has sa*id.* ¶ If you don't produce the expert, you can't open the topic because it leaves these people with the impression that it's got some sort of scientific basis and they ought to give it some weight. ¶ I can instruct them to give it no weight whatsoever, just like the little finger –
MS. McMURRAY: That's fine.
JUDGE VAN VOORHIS: – and make fun of it and ridicule it to the point they will disregard it. [In a footnote, the masters noted, "At this point in the proceedings, Ms. McMurray was concerned that the judge's proposal to make fun and ridicule her evidence would result in a devastating blow to her case."]

But suppose they are not able to do that –
Ms. McMURRAY: If Your Honor wants to instruct them on this one test, that's fine, Your Honor. It was only one piece of the entire field sobriety test she gave the defendant.
JUDGE VAN VOORHIS: You are not able to offer sufficient scientific evidence to support gaze nystagmus in a court of law?
MS. McMURRAY: I have this officer present here.
JUDGE VAN VOORHIS: This officer probably will not qualify. I'll let you go down that road, but if you keep pursuing it and try to qualify her and she doesn't qualify, and you have wasted a lot of time, and I may have to take the jury away from you because you leave them with the impression that it means something. You can't start off leaving them with the impression that it means something and then never tell them what it means. This officer probably will not qualify as an expert in the field of gaze nystagmus.
MS. McMURRAY: So, Your Honor, you have given me two options. One is continue and waste time or, two, is give the jury an instruction, so I'm not going to do something that the Court is telling me not to in a convoluted way.

judge's last comments in the colloquy were made in a "sing-song sarcastic, and very condescending tone of voice." They noted that Judge Van Voorhis admitted that he criticized Ms. McMurray's performance as an attorney and that when he queries an attorney in front of the jury – as he did here – it was with the potential of diminishing the attorney's credibility in the eyes of the jury.

The masters further found that Ms. McMurray's perspective on using the officer was reasonable.

> In *People v. Leahy* (1994) 8 Cal.4th 587, 611, our Supreme Court held that once the gaze nystagmus test had been shown to be generally accepted in the scientific community and as reflected in a published opinion, no reason would exist to require an independent expert to testify. A trained law enforcement officer could testify as to the results of the test. The following year, in *People v. Joehnk* (1995) 35 Cal.App.4th 1488, 1507-1508, the court of appeal concluded that gaze nystagmus testing had been accepted in the scientific community. Thus, it appears that the evidence was admissible without further foundation as claimed by Ms. McMurray. No contrary authority was cited by the court.

JUDGE VAN VOORHIS: Right, you would only waste more time.
MS. McMURRAY: That's correct.
JUDGE VAN VOORHIS: You're only asking to waste more time.
MS. McMURRAY: I don't want to waste the Court's time.
JUDGE VAN VOORHIS: Exactly. So aren't we ready now to find out whether the jurors can follow my instruction or not and then we will abandon this topic?

Finally, the masters discounted Mr. Larkin's testimony that Judge Van Voorhis was not overly harsh with Ms. McMurray and that she continued to argue with the court after the court had ruled. The masters explained:

> We have independently reviewed the transcript and do not accept Mr. Larkin's version of the events. Clearly, the judge prolonged the argument by asking more questions that were leading nowhere. Moreover, the caustic comments about Ms. McMurray and her case were made in the presence of the jury. Here, there was absolutely no hint of bad faith by the prosecutor as she had tried a case with similar issues before another judge where that court allowed gaze nystagmus evidence before the jury without an expert. Likewise, there was no motion in limine to exclude such testimony. The court's continued discourse in full view of the jury was wholly unnecessary. Ms. McMurray's request to handle the matter outside the presence of the jury was denied leaving the jury to hear this discussion.

In addition to reviewing the transcript, the masters had the benefit of hearing testimony from Judge Van Voorhis, Ms. McMurray, Mr. Larkin and others. The Supreme Court has consistently held that the factual findings of the special masters are accorded "special weight."[10] The commission,

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[10] *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 914 (*Fletcher*). See also *Furey v. Commission on Judicial*

having reviewed all the materials before it, including the masters' report and Judge Van Voorhis's objections to the report, adopts the masters' findings on Count Two A(2).

2. Conclusions of Law

The masters concluded that Judge Van Voorhis's remarks constituted willful misconduct. The Supreme Court has held that to commit willful misconduct in office, "a judge must (1) engage in conduct that is unjudicial and (2) committed in bad faith, (3) while acting in a judicial capacity."[11]

Judge Van Voorhis's comments were clearly unjudicial. The masters observed that Judge Van Voorhis impugned the prosecutor "by accusing her of starting something she had no intention of finishing" and that by "making this false accusation, the judge abandoned his role of neutrality." The masters further noted that Judge Van Voorhis "abandoned his role of neutrality by interjecting his views and opinions about the gaze nystagmus test."[12]

Performance (1987) 43 Cal.3d 1297, 1304 (*Furey*) ("We do, however, give special weight to the factual determinations by the masters, who are best able to evaluate the truthfulness of witnesses appearing before them.") The Supreme Court cited its opinions in *Gubler v. Commission on Judicial Performance* (1984) 37 CaL3d 27, 34 and *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 623 (*Wenger*).

[11] *Broadman, supra*, 18 Cal.4th at p. 1091.

[12] The masters explain:

"It is fundamental that the trial court, however, must refrain from advocacy and remain circumspect in its comments on the evidence, treating litigants and witnesses with appropriate respect and without demonstration of partiality or bias." (*Kloepfer v. Commission on Judicial Performance*, [(1989)] 49 Cal.3d 826, 845 [(*Kloepfer*)], quoting *People v. Carlucci* (1979) 23 Cal.3d 249, 258.) "A trial judge may not. . . in the course of examining witnesses become an advocate

The masters concluded that Judge Van Voorhis "violated Canon 1 by failing to observe 'high standards of conduct.. so that the integrity and independence of the judiciary will be preserved." The judge violated canon 2A by failing to act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and he violated canon 3B(4) by failing to be "patient, dignified and courteous" to Ms. McMurray.

As he was presiding over a criminal jury trial when he uttered his comments, Judge Van Voorhis was acting in his judicial capacity.

Judge Van Voorhis contends that his comments cannot constitute willful misconduct because there is no "bad faith." In his brief, he explains that he felt obligated to advise the jury that it was not to consider the evidence in order to ensure that the criminal defendant received a fair and unbiased trial. In his oral presentation to the commission, Judge Van Voorhis appeared to argue that because his comments arose out of frustration or anger, he did not have a "corrupt purpose" and thus he did not act in "bad faith."

The Supreme Court has indicated that "bad faith" is not limited to matters involving corruption or moral turpitude,[13]

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for either party or cast aspersions or ridicule upon a witness." (*McCartney v. Commission on Judicial Qualifications*, [(1974)] 12 Cal.3d 512, 533 [(*McCartney*)].) The same principle applies to judges who are commenting about a witness's testimony. While "'nothing would prevent the defendant from challenging" a police officer's evaluation of an HGN test '"with expert testimony of his own." (*People v. Joehnk* [(1995)] 35 Cal.App.4th 1488, 1508, quoting *Leahy*, [(1994)] 8 Cal.4th 587, 611), it is not the judge's role to he that expert.

[13] See *Doan, supra*, 11 Cal.4th 294, 340, noting that in *Geiler supra*, 10 Cal.3d 270, and *Gonzalez, supra*, 33 Cal.3d 359, the Supreme Court removed judges from office hut permitted them to resume the practice

but includes intentionally committed acts, which the judge knew, or should have known, were beyond his or her lawful power.[14] The Supreme Court offers the following relevant explanation:

> Because transgressing the limits of a judge's lawful authority is not the faithful discharge of judicial duties, a judge who performs such acts with no regard at all for whether they are legally permitted cannot be said to be acting with a purpose to faithfully discharge judicial duties. Thus, a judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith.[15]

The Supreme Court summarizes its analysis of "bad faith" with the following sentence:

> A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial

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of law because they did not find moral turpitude, dishonesty, or corruption.

[14] *Broadman, supra*, 18 Cal.4th at p. 1091.

[15] *Id.* at p. 1092.

> act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority.[16]

Judge Van Voorhis's explanation that he was concerned that the defendant receive a fair trial, if believed, would justify his ruling and his instruction to the jury. The issue in this count, however, as in other counts, is not whether the judge's legal ruling was correct. The issue also is not whether counsel provoked the judge. Rather, the issue is how to characterize the judge's lashing out at counsel.

The judge was clearly authorized to rule and instruct the jury, even if his ruling were ultimately determined to be incorrect. Instead, he engaged in a lengthy colloquy in which he questioned the prosecutor's motives for seeking to introduce the evidence, ridiculed her perspective and threatened to declare a mistrial if she continued. Judge Van Voorhis conducted this dialogue in front of the jury, and disparaged the prosecutor's request that the matter be resolved outside the presence of the jury. Furthermore, Judge Van Voorhis did not make a firm ruling until the end of the colloquy after he had ridiculed the prosecutor and prejudiced her case before the jury.

When a judge lashes out in anger or frustration or personally attacks an attorney or becomes embroiled in a matter, the judge abandons his or her judicial role. This is not to suggest that judges do not become frustrated or angry. The Code of Judicial Ethics, however, restrains the way a judge may manifest anger or frustration. For example, canon 2A states that a judge "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and canon 3B(4)

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[16] *Ibid.*

provides that a judge "shall be" patient, dignified and courteous. Although any evaluation of a judge's conduct should consider the context in which the conduct took place, the canons apply even when a judge is angry or frustrated.

The masters found that the "judge's statements here could not have been meant for any purpose other than to deliberately ridicule Ms. McMurray and prejudice her case in front of the jury" and accordingly Judge Van Voorhis made his comments "for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties) . . ." The masters, in essence, did not believe Judge Van Voorhis's rationale for his comments. The commission adopts the masters' findings on Count Two A(2) and have no quarrel with the masters' conclusion of law.

Even if the commission were to accept Judge Van Voorhis's explanation, it would justify only his ruling (and possibly his instructions to the jury). His concern that the defendant receive a fair trial in no way justifies his deprecation of the prosecutor's motives, his ridiculing of her perception or his prejudicing of her case before the jury. In other words, the comments cannot be said to have been made in the "faithful discharge of judicial duties." It is clear that – as he implied in his oral presentation to the commission – Judge Van Voorhis lost his temper and made comments for the corrupt purpose of venting his anger or frustration.

Finally, the commission notes that if bad faith were not apparent under the first of the three tests for "bad faith," it might well be proved under the third test: "performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority." Judge Van Voorhis had been publicly reproved by the

commission for his demeanor and, just two weeks before his comments, his presiding judge had cautioned Judge Van Voorhis verbally and in writing about his demeanor. Under these circumstances, Judge Van Voorhis's attack on the prosecutor's personal motives and his ridicule of her perspective has the appearance of a "conscious disregard for the limits of the judge's authority."

The commission joins the masters in concluding that Judge Van Voorhis's comments to the prosecutor constituted willful misconduct.[17]

D. Count Two A(3)

1. Findings of Fact

Estaban Alvear is a Deputy Public Defender in Contra Costa County who represented Mr. Hoye in a criminal trial before Judge Van Voorhis in January 2000. Mr. Alvear was born in Ecuador and had lived in San Francisco for ten years before the trial. The state was represented by Deputy District Attorney Christine Meade.

After a guilty verdict and the imposition of judgment, Judge Van Voorhis, while still on the bench, offered a critique of Ms. Meade's performance, possibly at her request. After he completed his critique of Ms. Meade, Judge Van Voorhis turned to Mr. Alvear, who was still at counsel table helping his client fill out forms. Judge Van Voorhis, after generally complimenting Mr. Alvear, stated something to the effect that Mr. Alvear's accent was charming but he should lose it. As noted by the masters,

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[17] In *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 703 (*Cannon*), the Supreme Court held that the judge's deliberate ridiculing of attorneys constituted willful misconduct in office.

Mr. Alvear did not ask Judge Van Voorhis for a critique of his performance. Mr. Hoye immediately rose to the defense of his attorney saying that he thought Mr. Alvear did a good job.

The masters found that the "comments to Mr. Alvear were hurtful to him personally, and made worse because his client was seated next to him when the remark was made."

The masters' further found that "[i]n a conversation between Judge Van Voorhis and Assistant Public Defender Susan Hutcher that occurred in the hallway of the courthouse, the judge told Ms. Hutcher that Mr. Alvear performed well as an attorney but that he was concerned about Mr. Alvear's accent. Specifically, the judge said that he needed to lose the accent and suggested that speech therapy might help. Ms. Hutcher explained that Mr. Alvear was from another country and that she thought the accent was charming. Judge Van Voorhis told Ms. Hutcher something to the effect that he thought the accent was annoying or difficult to understand. It was after that conversation that Ms. Hutcher heard about the comments made to Mr. Alvear about his accent."

Judge Van Voorhis testified that he suggested to Mr. Alvear that he "work on" or "lose" his accent in order to better communicate with the jury and witnesses. Judge Van Voorhis stated that there were two reasons for his comment. First, he felt that because he had made positive and negative comments about Ms. Meade's performance, Mr. Alvear "may feel slighted if I don't offer some words of advice." Second, he testified that when Mr. Alvear was cross-examining the police officer, the officer and others in the courtroom momentarily misunderstood Mr. Alvear's statement about "walking around" as an obscenity. Judge

Van Voorhis admitted that the advice was "uninvited," "too bluntly stated," and "perhaps inept."

The masters, however, stated:

> We do not credit the testimony of Judge Van Voorhis that his comments were motivated by concern that Mr. Alvear's pronunciation of walking was heard by others as cursing. The judge did not mention that to anyone at the time the remarks were made to Mr. Alvear. Secondly, no one else that was present testified to any such concerns. Finally, our own perceptions of Mr. Alvear's accent compel us to discredit Judge Van Voorhis's alleged concerns.[18]

Judge Van Voorhis never apologized to Mr. Alvear concerning this incident, even after the Public Defender wrote him a letter.

The commission adopts the masters' findings on Count Two A(3) concerning Judge Van Voorhis's comment to Mr. Alvear.

2. Conclusions of Law

Judge Van Voorhis's comment constitutes prejudicial misconduct because it would have appeared to an "objective observer" familiar with the facts and the

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[18] The masters noted, "[a]lthough Mr. Alvear speaks with an accent, we had no difficulty understanding him, even in a hearing room where the acoustics were not particularly good. Christine Meade testified that Alvear's accent has not changed since the trial. We find that his accent does not make him difficult to understand."

standards of conduct that the judge's comment was prejudicial to the public esteem for the judicial office. It is one thing for a judge to respond to a request for advice from a prosecutor who has just won a conviction, This, however, does not justify offering unsolicited criticism from the bench to the losing defense counsel in front of his client. Accordingly, Judge Van Voorhis's gratuitous remark violated canons 1, 2A and 3B(4), regardless of his subjective intent.

The masters further concluded that Judge Van Voorhis also manifested bias or prejudice based on race or national origin in violation of canon 3B(5). They state that the "comment to Mr. Alvear was insensitive and could have been perceived by members of the public as indicative of bias related to Mr. Alvear's ethnicity."

The commission concludes that Judge Van Voorhis's comment to Mr. Alvear gave the appearance of bias or prejudice based on race or national origin in violation of canon 3B(5). The masters, having observed all the witnesses, including Judge Van Voorhis and Mr. Alvear, concluded that the judge's comment could reasonably be perceived by members of the public as indicative of bias. The masters' findings are entitled to special weight,[19] and the commission, having considered the evidence and the judge's arguments, concurs that the comment gave the appearance of bias or prejudice. Judge Van Voorhis's subjective intent is not controlling and the commission makes no determination as to his subjective intent.[20]

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[19] *Fletcher, supra*, 19 Cal.4th at p. 914.

[20] Prejudicial misconduct "does not require the presence of bad faith, but may occur when a judge, though acting in good faith, engages in conduct that adversely would affect the esteem in which the judiciary is held by members of the public who become aware of the circumstances

E. Count Two A(4)

1. Findings of Fact

Judge Van Voorhis presided over a criminal jury trial in *People v. McDonald* in March 2000. The defendant was represented by James Crew. Deputy District Attorney Christine Meade, who had tried her first case six weeks earlier in front of Judge Van Voorhis, was the prosecutor. This was her first trial on a theft related offense.

A motion in limine was filed concerning the use of a prior conviction for theft for impeachment and the court ruled that the prior conviction was admissible. At trial, the defendant, while under cross-examination, claimed he did not know whether he had been convicted of embezzlement. Ms. Meade then asked the defendant if he was on probation for that conviction and the defendant asked her to repeat the question. The defendant then agreed that he had been convicted of theft, and the prosecutor asked if he was on probation for that offense. At that point, Judge Van Voorhis interrupted and began to interrogate Ms. Meade in the presence of the jury.[21]

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of the conduct. The subjective intent or motivation of the judge is not a significant factor in assessing whether prejudicial conduct has occurred under this standard." *Adams, supra*, 10 Cal.4th at p. 878. In *Gonzalez, supra*, 33 Cal.3d 359, 376, the Supreme Court considered several ethnic and sexual remarks and held: "Judge Gonzalez' subjective intent is not at issue. As a judge he is charged with the obligation to conduct himself at all times in a manner that promotes public confidence and esteem for the judiciary."

[21] The Masters note the following excerpt from the trial.

JUDGE VAN VOORHIS: I want to ask you a question, and I have the power to do that. ¶ I want to know where you learned in law school, or the District Attorney's Office, that his probationary status is admissible in a court of law.

MS. MEADE: I'm sorry, Your Honor. I did not learn that.

JUDGE VAN VOORHIS: Yeah, And so were you just guessing what you could get away with in a courtroom?
MS. MEADE: No, Your Honor.
JUDGE VAN VOORHIS: Then, tell me, on what basis did you ask that question?
MS. MEADE: On the basis of having a certified copy of the terms –
JUDGE VAN VOORHIS: But you know and I know that what I agreed you may
do is prove the conviction. And you remember me, many times, asking you in what form you intended to prove this conviction, and you never mentioned anything about asking him about probation; did you?
MS. MEADE: No, Your Honor.
JUDGE VAN VOORHIS: You see why I feel a little jilted now?
MS. MEADE: Yes, Your Honor.
JUDGE VAN VOORHIS: And then I gave you an opportunity to show me any legal basis that you may have to do it, and you contended there is absolutely none. So now, I want to know what your motives are, because they appear to be – to violate my rulings and to break California law in terms of what is permitted in a criminal courtroom, and I'm here to stop you.
MS. MEADE: I understand that, Your Honor. I have a certified copy of the conviction
JUDGE VAN VOORHIS: That's not what I'm talking about. Shall you focus again on what you did? You asked him about his probationary status; didn't you?
MS. MEADE: Yes, Your Honor.
JUDGE VAN VOORHIS: Well, you know you can't do that; don't you?
MS. MEADE: I do now, Your Honor.
JUDGE VAN VOORHIS: Didn't you know it at the time of the question?
MS. MEADE: No, Your Honor.
JUDGE VAN VOORHIS: So when I asked at the beginning of this trial how you were going to prove it, you thought I was just making conversation?
MS. MEADE: No, Your Honor.
JUDGE VAN VOORHIS: You knew that you were going to be confined to those for [sic] rules of proof because that's why I was asking the question, to find out what you were going to do; right?

The masters stated that after the exchange, "Ms. Meade left the courtroom in tears. She called her supervisor to tell him that she had been accused of misconduct and thought she could be disbarred."

The masters then made the following findings:

> The judge's demeanor during this exchange, which was all in front of the jury, was extremely demeaning, belittling and sarcastic. Several of the judge's statements (e.g., "And so were you just guessing what you could get away with in a courtroom?" [and] "So when I asked at the beginning of this trial how you were going to prove it, you thought I was just making conversation?") were sarcastic; the judge admitted that the latter statement had a sarcastic tone.

MS. MEADE: I believed I was confined to the certified copy of the probation terms.

JUDGE VAN VOORHIS: I made that very clear to you now, and now you have gone off in another direction, without any legal basis whatsoever, and you have made a mistake. I won't let you do that.

The masters went on to note that after the above-mentioned dialogue, "the court then instructed the jury to disregard the question and proceedings continued:"

JUDGE VAN VOORHIS: ... You need to be way more careful in my courtroom than you just were –

MS. MEADE: Yes, Your Honor.

JUDGE VAN VOORHIS: – or you could he in a lot of trouble.

MS. MEADE: Yes, your honor.

JUDGE VAN VOORHIS: Abide by my rulings or you'll tangle with me.

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The judge's closing threat, "Abide by my rulings or you'll tangle with me," and his reference to law school, "I want to know where you learned in law school, or the District Attorney's Office, that his probationary status is admissible in a court of law" were undignified and discourteous. The judge has admitted that a similar reference to law school made to William Gardner in the Silva matter was "gratuitous," "demeaning," and "undignified."

The judge's questioning of Ms. Meade's motives ("So, now I want to know what your motives are, because they appear to be – to violate my rulings and to break California law in terms of what is permitted in a criminal courtroom, and I'm here to stop you.") was discourteous and suggested a lack of impartiality. The phrase "break the law" carries the connotation of a criminal act and would be interpreted by the jurors as such. The judge admitted that a "skilled judge just doesn't make those accusations in the presence of the jury. . ."

The judge's statement – "You see why I feel a little jilted now?"– was personal and undignified. His cross-examination of Ms. Meade ("Well, you know you can't do that; don't you?"; "Didn't you know it at the time of the question?"; "You knew that you were going to be confined to those rules of proof because that's why I was asking the question, to find out what you were going to do; right?"[)] and his personal criticism of her ("I made that very clear to you now, and now you have gone off in another direction, without any legal basis whatsoever, and you have made a mistake. I won't let you do that."), were also inappropriate, especially when made in front of the jury.

The judge's conduct toward Ms. Meade was part of a pattern of being undignified, impatient, discourteous and

sarcastic to her. When the judge asked Ms. Meade during a colloquy involving another witness, "What is the point?" and Ms. Meade responded, "There really isn't," the judge stated, in front of the jury:

"Congratulations. You are the first lawyer that has ever admitted that in my courtroom."

When Ms. Meade objected to a line of questioning on the ground that the matter should have been raised [at] pretrial, the judge asked where she learned that. When Ms. Meade replied that she learned it from the "normal practice," the judge replied, in front of the jury: "You are wrong. Study more."

The commission, having reviewed all the materials before it, adopts the masters' findings of fact on Count Two A(4).

2. Conclusions of Law

The transcript shows that Judge Van Voorhis, in the masters' words: "interjected himself into the proceedings by engaging in a lengthy, antagonistic critique of Ms. Meade's performance and ethics, in front of the jury, the defendant and opposing counsel. The judge's statements unnecessarily attacked Ms. Meade's legal training, professional competence, and motives, and accused her of breaking the law, when it should have been obvious to the judge that Ms. Meade was simply an inexperienced prosecutor who innocently misunderstood what she could do. The judge's remarks violated his duty to be patient, dignified and courteous, and gave the appearance that he was unable to remain neutral and impartial in the consideration of the matter. He unnecessarily embroiled himself, as he has shown a propensity to do on other occasions, in a needless and harmful harangue."

The commission agrees with the masters that Judge Van Voorhis's extended remarks to Ms. Meade constitute willful misconduct. They were made in his judicial capacity and were unjudicial as they violated canons 1, 2A and 3B(4).

Judge Van Voorhis defends his comments on the ground that he sought to correct the potential prejudicial effect of the prosecutor's inquiry into whether the defendant was on probation. Judge Van Voorhis's contention, like his contention on Count Two A(2), might well justify his determination not to allow the prosecutor to inquire into the defendant's probation status, but does not excuse the judge being "undignified, impatient, discourteous and sarcastic" to Ms. Meade in front of the jury. One of the charges against the judge in *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297 (*Kennick*) alleged that the judge's behavior toward the prosecutor was "demeaning, rude, impatient and abusive." The Court agreed with the commission that the judge's actions constituted willful misconduct, even though the judge's underlying ruling was not misconduct.[22]

Similarly, in this case there is no challenge to Judge Van Voorhis's decision to block the prosecutor's line of inquiry. At issue is Judge Van Voorhis's personal attacks on the prosecutor's motives, education and performance. These attacks were not made in the "faithful discharge of judicial duties." Rather, it is clear that Judge Van Voorhis lost his temper and made comments in bad faith for the corrupt purpose of venting his anger or frustration.

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[22] *Kennick, supra*, 50 Cal.3d at p. 324.

F. Count Two A(5)

1. Findings of Fact

In the *Elze* case (see Count One), Deputy District Attorney Stacey Brock attempted to introduce evidence that the defendant was unable to understand or follow the officer's directions when attempting to perform the gaze nystagmus test. Ms. Brock was not attempting to introduce the results, only the fact that the defendant could not follow directions.

When Ms. Brock asked the officer whether the defendant appeared to understand what he was supposed to do, Judge Van Voorhis interrupted and the following colloquy took place:

> JUDGE VAN VOORHIS: You are only going to be able to admit this if you bring an expert that's going to tell us what it means.
>
> MS. BROCK: We won't be offering the results of it, Your Honor.
>
> JUDGE VAN VOORHIS: So why even bring it up?
>
> MS. BROCK: Inability to follow directions.
>
> JUDGE VAN VOORHIS: You could ask him about that in general, but you know that if you offer evidence of that, they are liable to think it means something. ¶ Tell them it does not mean anything.
>
> MS. BROCK: This doesn't mean anything.
>
> JUDGE VAN VOORHIS: Yeah. So why bother with it?
>
> MS. BROCK: I would like to proceed, your Honor.

JUDGE VAN VOORHIS: You can ask him if on other tests he failed to follow directions, and take your answer and go with that.

MS. BROCK [to the witness]: Q. Did the defendant –

JUDGE VAN VOORHIS: But, you know, I'm not going to let you offer any evidence of what you referred to as horizontal gaze nystagmus because it means nothing. ¶ If you can't follow that instruction from me, raise your hand now. Great. Then we'll ignore it. Try again. Stay away from that.

The masters found that this exchange took place in open court in front of the jury, Judge Van Voorhis "was red faced, tense and raised his voice," and he "pointed when he told Ms. Brock to instruct the jury that it did not mean anything." They found that Judge Van Voorhis was discourteous and humiliated Ms. Brock in front of the jury. They further noted that Ms. Brock was afraid she was going to be held in contempt by the court.

The masters determined:

> Judge Van Voorhis admitted during the hearing that he had no authority for requiring an attorney to confess mistakes to a jury by requiring the lawyer to speak directly to the jury. The judge testified that he took very serious action because. he believed that [he] thought that Deputy District Attorney Brock had jeopardized a

fair trial. Judge Van Voorhis stated, "[he] felt that [Ms. Brock] was – there was an attempt on her part to have the jury disregard what I was doing as a judge and –" Judge Van Voorhis testified that Ms. Brock had been trying to undermine his "power to rule that this was not admissible evidence." Even though the prosecutor limited her basis for discussing the gaze nystagmus issue to defendant's inability to follow directions, Judge Van Voorhis testified that Ms. Brock was "leaving the jury with the implication" that the test could help the jury "determine sobriety." The judge also testified that Ms. Brock was "doing something which she knows she can't do."

Based on the record, we find that the judge's explanation for his conduct, that he was protecting the defendant's rights against the prosecutor's attempt to introduce inadmissible evidence, unconvincing. The proffer made by the prosecutor in compliance with the court's questionable understanding of the status of the law on gaze nystagmus was that the evidence was not being introduced for the results of the test, only the inability of the defendant to follow directions. It was the court that ignored the proffer and began his finger-pointing, red-faced tirade. This culminated in the humiliating experience of the prosecutor being forced into making a statement that the evidence meant nothing

> directly to the jury, thus risking her credibility with the jury as the case progressed to conclusion.
>
> We find that Ms. Brock had done nothing wrong or inappropriate and the conduct and humiliation imposed on her by Judge Van Voorhis entirely inappropriate.

The commission, having reviewed all the materials before it, adopts the masters' findings of fact on Count Two A(S).

2. Conclusions of Law

It is the judge's role to make evidentiary rulings and instruct the jury if necessary. Here, the masters concluded that Judge Van Voorhis "abused his authority by ordering the prosecutor to admit to the jury that relevant evidence, which she in good faith was attempting to introduce, 'does not mean anything." The masters concluded that the judge's order "served no proper purpose, violated his duty to be patient, dignified and courteous, and gave the appearance that he was unable to remain neutral and impartial in the consideration of the matter."

The commission agrees with the masters that Judge Van Voorhis's remarks and order to Ms. Brock to admit that the evidence "does not mean anything" constitute willful misconduct. Judge Van Voorhis was acting in his judicial capacity and his statements were unjudicial in that they violated canons 1, 2A and 3B(4).

Judge Van Voorhis's determination to exclude any evidence of the gaze nystagmus test is not in issue. At issue is his belittling of the prosecutor and his forcing her to make an admission to the jury. These actions and

comments were not made in the "faithful discharge of judicial duties." The masters commented that Judge Van Voorhis "admitted that he knew of no authority in California that permitted him to order a lawyer to confess her mistakes to the jury, and must have known there was none." As indicated by Judge Van Voorhis's apparent failure to appreciate that the prosecutor sought only to introduce evidence of the defendant's inability to follow instructions, Judge Van Voorhis lost his temper and made comments before the jury in bad faith for the corrupt purpose of venting his anger or frustration

C. Count Two A(6)

1. Findings of Fact

The day following the events described in Count Two A(5), Mr. Gomes asked his client, Mr. Elze, whether he drank more at home or when he went out. Ms. Brock objected to the question. In the exchange that followed Ms. Brock's objection, Mr. Gomes several times declined Judge Van Voorhis's suggestions that the evidence was admissible character evidence to prove a pattern of behavior and that the defendant had acted consistently with that behavior.[23]

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[23] The transcript from the trial shows the following dialogue.

MR. GOMES [to Mr. Elze, the witness]: Do you ever go out in public and get drunk?
MS. BROCK: Objection. Relevance.
THE WITNESS [Mr. Elze]: For what purpose?
MR. GOMES: I asked you that question. Please answer it.
JUDGE VAN VOORHIS: What's the relevance?
MR. GOMES: Well, it's relevant as to the frequency of his drinking.
THE WITNESS: What purpose? I mean, why should I go out to get drunk?

JUDGE VAN VOORHIS: You are offering [it] as character evidence?
MR. GOMES: Okay.
JUDGE VAN VOORHIS: Are you?
MR. GOMES: No. No. I'm just – I'll rephrase the question.
JUDGE VAN VOORHIS: Uh-huh.
MR. GOMES [to the witness]: Q. Now, I want you to answer my questions "yes" or "no."
JUDGE VAN VOORHIS: All right. He's not really required to do that, and you are really not supposed to prompt him on how you would like him to answer.
MR. GOMES: I'm just trying to – okay.
Q. [to the witness]: So do you go out every week and drink?
MS. BROCK: Objection. Relevance.
JUDGE VAN VOORHIS: Are you trying to show a habit or custom on his part and then –
MR. GOMES Yes.
JUDGE VAN VOORHIS: – conduct in conformity with that habit?
MR. GOMES: Yes.
JUDGE VAN VOORHIS: That's character evidence. You are offering character evidence?
THE WITNESS [Mr. Elze]: Are you telling me to answer, your Honor?
JUDGE VAN VOORHIS: I'm asking him.
THE WITNESS: Okay.
MR. GOMES: I'll withdraw that question.
Q. [to the witness]: Do you drink at home?
THE WITNESS: Sometimes.
MR. GOMES: Yeah?
THE WITNESS: Yeah. When we have dinner, when we stay at home, I have three tenants, and frequently, they will prepare me – one from Afghanistan, and two from the United States and different parts of the country so we have dinner, and we have something to drink, yes.
MR. GOMES: How about when you go out?
THE WITNESS: The same thing.
MR. GOMES: Do you drink less or more when you go out?
MS. BROCK: Objection. Relevance.
THE WITNESS: It depends on the situation.
JUDGE VAN VOORHIS: What's the relevance what he does on other occasions?
MR. GOMES: I think it's – I think it's probative, your Honor.

Nonetheless, Judge Van Voorhis determined that the evidence was relevant and turned to Ms. Brock. The masters' report referred to the following excerpt from the transcript and explanation.

> JUDGE VAN VOORHIS: And so now you see the relevance of it; right? It's character evidence, obviously, and there has been a lot of it already, so it's clearly relevant; isn't it? Isn't it? Tell me.[24]
>
> MR. GOMES: No.[25]

JUDGE VAN VOORHIS: I know you think that. Otherwise, you wouldn't be wasting our time. I would just like to have you explain what you're up to. It sounds to me like it's character evidence again; isn't it? You can do that, if you want to.
MR. GOMES: I'm – I'm certainly just asking questions within the scope, the same questions that she asked.
JUDGE VAN VOORHIS: Right. You just need to recognize that if what you're trying to do is show that he has a pattern of behavior, and, therefore, on this occasion, he acted consistent with that behavior, that's character evidence.
MR. GOMES: Yeah. I'm not using it to show that.
JUDGE VAN VOORHIS: Well, that's exactly what you are doing, aren't you?
MR. GOMES: I'm just rehabilitating him.
JUDGE VAN VOORHIS: That's exactly what you are doing, and if you want to do that, you are welcome to do that.
MR. GOMES: Okay.
JUDGE VAN VOORHIS: Just tell me that's what you're doing so she knows, you know, that you are doing that. You have the right to open up that topic or not. It's already pretty well open; isn't it?

[24] "The judge paused between each 'isn't it?' and 'tell me,' waiting for the prosecution to respond."
[25] "Curiously, while the judge was looking at Ms. Brock for a response, the proponent of the evidence responded with no, that was not the legal theory for admissibility."

JUDGE VAN VOORHIS: You tell me that it's relevant.

MS. BROCK: Do you want me to say that it's relevant, your Honor?

JUDGE VAN VOORHIS: Sure, it is; isn't it?[26]

MS. BROCK: Yes.

The masters' findings of fact concluded with the following paragraph.

> The remarks made by the judge were in front of the jury and clearly done with the intent of forcing Ms. Brock to agree with him. Ms. Brock felt humiliated by the judge who was angry, loud, short-tempered and red-faced. Our review of the transcript reveals nothing done by Ms. Brock to provoke such a response by Judge Van Voorhis. She replied yes to the judge's question, even though she believed the evidence was not relevant, because she was afraid the judge would hold her in contempt. The judge's testimony on this subject was that he allowed Ms. Brock to be heard because he had to "give her an opportunity to speak" and argue the evidence was not relevant. This explanation was not credible because the judge clearly badgered Ms. Brock into acquiescence. Ms. Brock's

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[26] "Ms. Brock testified that the judge actually said, "Sure. It is. Isn't it?"

version of the incident is far more credible and is supported by the transcript.

The commission, having reviewed all the materials before it, adopts the masters' findings of fact on Count Two A(6).

2. Conclusions of Law

The masters concluded that Judge Van Voorhis's remarks and order to Ms. Brock constituted willful misconduct as they were unjudicial, were made in bad faith and were made in his judicial capacity. The masters noted that although it is the judge's role to make evidentiary rulings and instruct the jury if necessary, Judge Van Voorhis abused his authority by forcing the prosecutor to agree with his ruling, admit to the jury that evidence to which she was objecting was relevant, and confess to the jury that she made a mistake.

The commission agrees with the masters that Judge Van Voorhis's statements constituted willful misconduct and violated canons 1, 2A and 3B(4) as they "served no proper purpose, violated his duty to be patient, dignified and courteous, and gave the appearance that he was unable to remain neutral and impartial in the consideration of the matter." The evidence shows that Judge Van Voorhis once again lost his composure and made comments before the jury for the corrupt purpose of venting his anger or frustration. The commission agrees with the masters that Judge Van Voorhis's contention that he intended to give the prosecutor an opportunity to register an objection under Evidence Code 352 is not credible because the judge clearly badgered the prosecutor into acquiescence.

H. Count Two B

1. Findings of Fact on Count Two B(1)

Ms. Carmichael, a court clerk in the Contra Costa Superior Court, was assigned to work as a fill-in clerk for Judge Van Voorhis on July 13, 1999. The judge asked her to check the jury trial calendar for later in the week and to have the files brought upstairs so he could look at them. Ms. Carmichael called downstairs to the clerk's office and the office responded that they would get the files upstairs as soon as they could. Ms. Carmichael told the judge that there were six jury trials scheduled. When the files were not immediately brought up, Judge Van Voorhis began to get angry. The clerk's office advised that of the six files, they were missing two. When the files were brought to the courtroom, Ms. Carmichael handed them to the judge. The masters found that while court was in session, Judge Van Voorhis angrily told Ms. Carmichael to call and find out where the missing files were. They further found that he pointed his finger at the clerk when he was speaking harshly to her.

Judge Van Voorhis testified that he had no recollection of the incident. He testified that in the morning he had notified the presiding judge that he would be free the following day to handle assignments. Judge Van Voorhis explained that Ms. Carmichael had failed to notify him that there were cases scheduled before him the following day. This prompted Judge Van Voorhis to tell the supervising clerk, Ms. Morgado, that he hoped that his replacement clerk was properly trained to make sure that there were no pending matters on calendar the next day.

During the noon recess, Ms. Morgado told Ms. Carmichael that Judge Van Voorhis was upset with her. When Ms. Carmichael returned to the courtroom after

lunch, Judge Van Voorhis told her how important it was for him to have accurate information about his caseload to report to the presiding judge. He further told her that otherwise he looked like he did not know what was going on in his own courthouse. Judge Van Voorhis testified that he noticed that Ms. Carmichael was becoming teary-eyed as he spoke to her and that he stopped.

The afternoon calendar included "in custody" defendants and "volaps" (individuals that voluntarily appear on bench warrants or violations of probation). None of the volaps were in the courtroom when the calendar was called.

The masters found that in "an angry tone of voice," the judge said, "I have no bodies. I have these files. What's going on?" As Judge Van Voorhis was saying this, he threw the files over the ledge of the bench. The stack of files was about four inches high. The judge was very, very angry when he threw the files. The judge never apologized for throwing the files.

Ms. Carmichael was shocked and started to tear up as she picked up the files. Ultimately, she telephoned a neighboring courtroom and found the defendants who had been sent to the wrong courtroom.

Judge Van Voorhis denies that he threw the files at Ms. Carmichael. He testified that he put the files on a tabletop next to his computer and directed Ms. Carmichael to go and get the missing defendants. He stated, "If it fell, it was accidental. Believe me." The judge testified that he did not remember if the files spilled over to the other side.

Judge Van Voorhis attributed his lack of memory to the delay in informing him of the accusation. The masters commented:

> Indeed, the judge went to great lengths to claim that no one ever told him that "it was the throwing of the files that was the problem." He even wrote a letter to Presiding Judge Mark Simons, after meeting with him on August 4, 1999, and stated that they had not discussed the "details relating to the incident," and that Judge Van Voorhis had never been told what Ms. Carmichael had reported to the presiding judge. Judge Van Voorhis testified that because the presiding judge never wrote back to tell him "what this was all about," he was "in a worse position to defend" himself in front of the masters.

The masters found that "despite his denials, the truth slipped out during cross-examination." When discussing his lack of memory, Judge Van Voorhis testified: "Because I know at the instant I threw the files human beings looking in that direction are going to have, you know, the ability to perceive it."

After completing the calendar Ms. Carmichael began to cry. She went to Ms. Morgado's office. As a result of her report, Ms. Carmichael was not sent back to Judge Van Voorhis's courtroom and a complaint was filed with Paul Kunkel, the human resources officer.

Presiding Judge (now Justice) Mark Simon drove to Walnut Creek to meet with Judge Van Voorhis to discuss the incident and to make sure the conduct did not occur again. Judge Simon thought that Judge Van Voorhis clearly recognized that "his demeanor may have been such that it was viewed as harsh and rude." Judge Simon indicated that

he was interested in making sure that the behavior did not recur and recommended that Judge Van Voorhis enroll in a counseling or anger management program. Judge Van Voorhis replied that he was not interested in either program, but that he had private resources if he decided it was necessary. Judge Simons told Judge Van Voorhis that the incident could not be repeated and Judge Van Voorhis accepted that the conduct needed to be avoided in the future. Judge Simons sent a letter to Judge Van Voorhis memorializing the conversation and his advice that the conduct must not be repeated.

The commission, having reviewed all the materials before it, adopts the above recitation of the masters' findings as its findings of fact on Count Two B(1).

2. Findings of Fact on Count Two B(2)

Ms. Van Horn has been a courtroom clerk in Contra Costa County for 20 years. She filled in for Judge Van Voorhis's court clerk on April 19, 2000. When she arrived in the courtroom, the lawyers were completing their closing arguments in a jury trial.

It is the clerk's job at the end of the proceedings to swear the bailiff to take charge of the jury. After the judge gave closing instructions, the bailiff walked over to Ms. Van Horn and both raised their right hands and the oath was given. Ms. Van Horn administered the oath in the same way she had administered it in every other case, including cases in which Judge Van Voorhis had presided.

The masters found that after "she swore the bailiff, the judge stood up and told Ms. Van Horn that she had wasted 20 seconds of the court's time by swearing the bailiff on the record. He was red faced, tense and upset with her." They found that he also told her that there was a manual in

the courtroom that would explain the correct procedures. The masters noted that jurors, the district attorney, defense counsel, members of the audience and the defendant were present in the courtroom.

Ms. Van Horn was shaken and experienced shortness of breath. She felt embarrassed and humiliated. After composing herself, Ms. Van Horn went with another clerk back into the courtroom, retrieved the manual and found that it made no reference to swearing the bailiff off the record.

Both Michael Markowitz, an experienced defense attorney, and Ms. Christine Meade, the prosecutor in the case, agreed that the method used by Ms. Van Horn to swear in the bailiff was the same they had seen in all other jury trials.

Judge Van Voorhis stated in his verified answer that he "expressed a desire to Ms. Van Horn to dispose of cases in a more timely manner." He testified that he told her "in [a] conversational tone" – "the way I often do with clerks" – that within the previous couple of months, they had started swearing in the bailiff off the record and that the law does not require that the bailiff be sworn in on the record. He testified that he indicated that it saved only about 30 seconds, and that it did not matter to him if she wanted to swear in the bailiff on or off the record. He denied that he told her she had wasted 20 seconds of time or that there was a folder with written instructions on how to swear in the bailiff.

The masters credited "the testimony of Ms. Van Horn and Mr. Markowitz who corroborated her testimony." They rejected "the testimony of Judge Van Voorhis. Ms. Meade testified that the judge demanded to know of Ms. Van Horn how much of the court's time she had wasted to which Ms.

Van Horn responded about 10 seconds. We find that the comments of Judge Van Voorhis were uncalled for, belittling and sarcastic." "We conclude that the criticism of Ms. Van Horn was inappropriate and unjust. She had followed the directions contained in the courtroom manual and Judge Van Voorhis failed to explain any policy changes in his courtroom. His characteristic overreaction was so distressful to the clerk that she requested not to be assigned to Judge Van Voorhis's courtroom in the future."

The commission, having reviewed all the materials before it, adopts the masters' findings of fact on Count Two B(2).

3. Findings of Fact Count Two B(3)

Ms. Brown is a deputy sheriff in Contra Costa County and is assigned to the Court Services Bureau. On December 26, 2000, she filled in as a security deputy in Judge Van Voorhis's courtroom. Her responsibilities included "the maintenance of inmates and getting them into the courtroom assuring that the proper inmates appeared in court." She had never worked in Judge Van Voorhis's court before.

At around 7:00 a.m., Deputy Brown compared the list of inmates being transported to court with a list of inmates needed by the court. She noticed that there was an inmate, Ms. Johnson, who was not being transported, but was listed on the court calendar. Deputy Brown called the transportation unit and the main detention facility and was told that the records showed that the court date had been vacated and that Ms. Johnson did not need to appear. When Judge Van Voorhis's bailiff, Deputy La Fortune, came to work around 8:15 a.m., Deputy Brown advised him of the

fact that Ms. Johnson was not being transported because jail records showed that her court date had been vacated.

Deputy Brown then reported to the courtroom because the "in custody" calendar was starting. Her task was to get each inmate defendant and bring the person into the courtroom. During the course of the morning, Deputy Public Defender Quandt asked Deputy Brown to have Ms. Johnson brought out so he could speak with her. The request was made in the courtroom in the presence of Judge Van Voorhis, Deputy La Fortune and several attorneys.

The masters found that Deputy Brown informed Mr. Quandt that Ms. Johnson "had not been transported because her court date was shown to be vacated."[27] Mr. Quandt told Deputy Brown that there was a mistake and that Ms. Johnson needed to be in court that day. Judge Van Voorhis testified that when he overheard this conversation, he spoke up immediately.

> I started off with, "You need to learn how to do your job," and I stopped myself. And I started that sentence over. And I said, "You need to learn how to do your job in my courtroom." And I said, "Steve is going to teach you how to do your job in my courtroom, aren't you, Steve?" Steve was standing right there. And then I believe I repeated, "Steve is going to teach you" or

[27] Deputy Brown told the masters, "I believe I said that she was not transported because her court date had shown to be vacated." Judge Van Voorhis testified concerning Deputy Brown's response to Mr. Quandt, "I believe she said either 'she' or the person's name – 'She's not coming to court' She did not use the word[s] 'going to he transported.' She said, 'She's not coming to court."

"help you to learn how to do your job in my courtroom."

The masters found that Judge Van Voorhis further stated that Deputy Brown needed to learn how to do her job so he didn't blow his top in open court and that Deputy La Fortune was going to show her how to do her job. The masters found that when the judge made those remarks, he was angry, agitated and irritated. He was pointing his finger at Deputy Brown and he had a clenched jaw.

Deputy Brown was embarrassed by the remarks that were made in open court. She felt she was doing her job and had done nothing wrong. One of the inmates found the judge's remarks amusing. Judge Van Voorhis never asked her why the inmate was not there and never apologized for his remarks.

Judge Van Voorhis testified that Deputy Brown should have directly communicated to him the fact that Ms. Johnson was not being transported. He testified that he was concerned how the public would perceive Deputy Brown's statement in open court that the inmate was not coming to court.

The masters found the charge that the judge chastised Deputy Brown in a belittling tone to be sustained by clear and convincing evidence. Judge Van Voorhis stated there had been a long history of inmates not being transported to court by the sheriff's department, but he admitted that he did not know whether Deputy Brown was at fault and her conduct was not disrespectful to the court.

The commission adopts the masters' findings of fact on Count Two B(3).

4. Conclusions of Law on Count Two B

The commission agrees with the masters' conclusion that Judge Van Voorhis's "public criticisms of court personnel were harsh, rude and intemperate, and continued despite a 1992 public reproval for conduct that included twice giving directions to his staff in a manner that was perceived to be harsh and despite a warning from the presiding judge following the [Ms.] Carmichael incident."

The masters noted: (a) "In the incident involving [Ms.] Carmichael, the judge had a temper tantrum that included throwing files, and reduced a temporary clerk to tears"; (b) "In the incident involving [Ms.] Van Horn, the judge unfairly berated an experienced clerk in open court for swearing in a bailiff in the customary manner" and "also told the clerk that she would have known better if she had read his courtroom manual, even though the manual contained nothing that indicated that the clerk had done anything wrong"; and (c) "In the incident involving Deputy Brown, the judge took out his frustration with the sheriff's department by publicly humiliating a new security deputy who had never before performed those duties, and who was not at fault."

The judge's conduct in each of the three instances constituted prejudicial misconduct as it would have appeared to an "objective observer" familiar with the facts and the standards of conduct that the judge's comments were prejudicial to the public esteem for the judicial office. Similar conduct by other judges toward personnel has been found to be prejudicial misconduct.[28]

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[28] See *Kloepfer, supra*, 49 Cal.3d 826 (judge angrily berated a court reporter, reducing her to tears) and *McCartney, supra*, 12 Cal.3d 512 (judge threatened to hold his clerk in contempt, shouted at her to

Judge Van Voorhis's conduct violated canons 1, 2A, 3B(4) and 3C(l).[29]

I. Count Two C

1. Findings of Fact

People v. Sowande was a jury trial before Judge Van Voorhis on August 17 and 18, 2000. The charge was driving under the influence of alcohol and driving with an invalid license. The issue was whether the defendant, at the time that he was drunk, was actually driving.

Mr. Lewis, a defense witness, testified that he drove the defendant to the place where the defendant was later arrested, exited the car and left the keys in the ignition. The defendant testified that after Mr. Lewis left, he moved to the driver's seat, but did not go anywhere because he did not feel well and he fell asleep until a police officer woke him. The police officer testified that when he shook the defendant to consciousness, the defendant reached for the keys in the ignition to start the car. The defense contended that a conviction could not be based on the defendant

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apologize, discharging the clerk in a violent manner, speaking to an assistant clerk in a loud voice and pounding his fist loudly on her desk).

[29] The masters' explained:

In each instance, the judge violated Canon I by failing to observe "high standards of conduct . . . so that the integrity and independence of the judiciary will be preserved." The judge violated Canon 2A by failing to act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The judge violated Canon 3B(4) by failing to be "patient, dignified and courteous" to persons with whom the judge dealt in an official capacity. In addition, by ignoring a warning from his presiding judge that his conduct should not be repeated, Judge Van Voorhis failed to cooperate with the presiding judge in the administration of court business in violation of Canon 3C(l).

fumbling for his keys and attempting to start the car. Rather, a conviction could only be based on the defendant actually driving the car.

During deliberations, the jury sent several written questions to the judge. The last of these questions was: "Could the intent of the defendant, the act of reaching for the keys to start the car, be considered driving under the influence of alcohol?" After a discussion with counsel, Judge Van Voorhis decided that the answer to the jury's question was no. The judge then asked counsel if they wanted the jury brought back into the courtroom to receive the answer, and defense counsel opted to have the jury brought back.

When the jury was assembled, Judge Van Voorhis, while looking directly at the jury foreman, addressed the jury as follows:

> Mr. Foreperson, I'll give the answer to my question [*sic*], the parties and jurors are present, and you'll be able to take it with you to the deliberating room. I normally correspond in writing, but this time I've decided to answer your question orally, because I want you to look at the question you gave me. And you'll see that you could improve on your English, and therefore your question could be way more precise for me. ¶ And one of the things you can help me to do is to make your questions as precise as possible, which means look them over several times, because an English teacher would object to the wording of that question.

But I'll read it to you and then you'll see my answer.

The masters found that "Judge Van Voorhis's voice was condescending, arrogant, belittling, very nasty and derogatory." There was a wide variety of educational backgrounds among the jurors, one juror had a third grade education, others had college degrees. All of the jurors seemed upset by the judge's remarks.

Mr. Milina, a registered nurse, was the foreperson of the jury. He felt it was an honor to be on the jury and sought to do the best he could as a citizen. He was astounded by the judge's comments and felt that he was being questioned in front of the rest of the jury. The masters found that "the judge's comment almost affected the outcome of the case because Mr. Milina was so upset that he considered deciding the case on grounds other than the evidence. But in an effort to be fair, he based his decision in the case on the evidence, not his anger at the judge."

Judge Van Voorhis "testified that he wanted to explain to the jurors that they were coming into the courtroom to hear his answer when, on previous occasions, he had responded to their questions in writing." When defense counsel requested that the jury be brought in, the "first thing" that came through the judge's mind was that, because he had "given her an adverse ruling, maybe this was payback or something." It also occurred to Judge Van Voorhis that defense counsel might be trying to "attract attention to this as a particular issue and try to emphasize it for the jury in hopes that they would continue to focus on that. . . ." The judge testified that he did not want the jurors to speculate why they were being brought into the

courtroom, or to draw any inference from it. He also testified that he anticipated additional questions from the jurors and he wanted them to be precise in their questions. Once he brought the jurors in, he decided that he would say something about the imprecision of the question.

The commission adopts the masters' findings of fact on Count Two C.

2. Conclusions of Law

The commission agrees with the masters that Judge Van Voorhis's comments constituted prejudicial misconduct and violated canons 1, 2A and 3B(4). As noted by the masters, the comments "were unnecessarily disparaging and embarrassing to the jury foreperson, as well as to the other members of the jury whose thought processes were represented in the question. The judge made his comments after receiving a public reproval in 1992 for conduct that included questioning a potential juror in each of two criminal cases in such a way that each person perceived a 'lack of sensitivity' and felt 'intimidated.'"

DISCIPLINE

A. Criteria

Once the commission has determined that the allegations of misconduct have been demonstrated by clear and convincing evidence, the commission must determine the appropriate discipline. The commission takes as its mandate the Supreme Court's statement that the purpose of the proceeding "is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence

in the integrity and independence of the judicial system."[30] This is consistent with the Supreme Court's prior statement that the purpose of these proceedings "is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield."[31]

The Supreme Court has recognized that in determining the appropriate discipline, each case must be considered on its own facts.

> Proportionality review based on discipline imposed in other cases, however, is neither required nor determinative. The factual variations from case to case are simply too great to permit a meaningful comparison in many instances. "Choosing the proper sanction is an art, not a science, and turns on the facts of the case at bar."[32]

Even though each case is considered on its own facts, the commission looks to opinions of the Supreme Court and its own prior decisions for guidance in exercising its responsibility to determine the appropriate discipline. The commission has identified five considerations that are relevant to its determination of the appropriate discipline in this case: (1) the number of acts of misconduct; (2) the effect of any prior discipline on the judge's conduct; (3) whether the judge appreciates the inappropriateness of his

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[30] *Broadman, supra*, 18 Cal.4th at pp. 1111-1112, citing *Adams, supra*, 10 Cal.4th 866, 912.

[31] *Furey, supra*, 43 Cal.3d 1297, 1320, citing *Wenger, supra*, 29 Cal.3d at p. 654.

[32] *Broadman, supra*, 18 Cal.4th at p. 1112, citing *Furey, supra*, 43 Cal.3d at p. 1318.

or her actions; (4) whether the judge is likely to continue to engage in unethical conduct; and (5) the impact of the judge's misconduct on the judicial system.[33]

In addition, the commission considers any mitigating factors that a judge may advance.

1. The Number of Acts of Misconduct

In decisions concerning the removal of judges, the Supreme Court has often noted the number of acts of misconduct.[34] In *Furey, supra*, the Court explained that "the disposition of a case depends in large measure on the nature and number of charges found to be true."[35] There does not appear to be any minimal number of acts of misconduct required for removal. Rather, as noted by the Supreme Court in *Fletcher, supra*:

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[33] This is not an exhaustive list of possible considerations and no one consideration should be considered critical to the commission's determination of the appropriate level of discipline.

[34] See, for example, *Adams, supra*, 10 Cal.4th 866 (Judge Adams was removed from office for engaging "in successive extrajudicial transactions that extended over a significant period of time, creating an appearance of serious impropriety and thereby tending to diminish the public esteem of the judiciary – a consequence petitioner either deliberately ignored or was unable to appreciate." (*Id.* at p. 914.)); *Kloepfer, supra*, 49 Cal.3d 826 (Judge Kloepfer was removed for a continuing, pervasive pattern of misconduct – four acts of willful misconduct and twenty-one acts of prejudicial conduct); and *McCullough v. Commission on Judicial Performance* (1989) 49 Cal.3d 186 *(McCullough)* (Judge McCullough was removed for committing four acts of willful misconduct and one act of persistent failure to perform his judicial duties and his failure to respond to a prior public censure evidenced a lack of regard for the commission, this court and his obligations as a judge).

[35] *Furey, supra*, 43 Cal.3d 1297, 1307, fn. 2.

> "The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing 'lack of temperament and ability to perform judicial functions in an even-handed manner.' [Citation.]" (*Wenger, supra*, 29 Cal.3d at p. 653.) We have determined that petitioner twice committed willful misconduct and committed prejudicial misconduct on multiple occasions. "Together these incidents reflect a continuing, pervasive pattern of misconduct." (*Kloepfer, supra*, 49 Cal.3d at p. 866.)[36]

Similarly, in *Adams, supra*, the Supreme Court noted:

> [T]he misconduct that we have determined justified this most severe of disciplinary sanctions generally has involved a pattern of arbitrary, irrational and inappropriate conduct of the judge while acting on the bench in dealings with litigants, attorneys, witnesses and other persons, or while otherwise performing his or her judicial functions, and an abuse of his or her judicial powers and authority.[37]

Most recently, the commission ordered Judge Platt's removal from the bench based on five acts of willful misconduct and two acts of conduct prejudicial to the

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[36] *Fletcher, supra*, 19 Cal.4th at p. 918. 131

[37] *Adams, supra*, 10 Cal.4th at pp. 912-913.

administration of justice that brings the judicial office into disrepute.[38]

2. Prior Discipline

The second consideration is the effect of any prior discipline on the judge's conduct. In *Doan, supra*, 11 Cal.4th 294, 339, the Supreme Court removed a judge for willful and prejudicial conduct that displayed moral turpitude, dishonesty and corruption, but noted that it "would hesitate to remove a judge who showed himself ready, willing, and able to reform under a less severe sanction."[39] The Supreme Court, in removing Judge Doan, noted:

> Lastly, Doan did not learn from her public reproval in 1990 for lending the prestige of her office to advance the private interest of others. She again lent the prestige of her office to advance the private interest of others, even though she had promised not to do so in connection with the 1990 public reproval, in the matters relating to Darlene's nephew Darren Powell in 1992, Meneses in 1993, and Darlene herself in 1993.

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[38] *Inquiry Concerning Michael E. Platt*, No. 162 (2002). Platt's petition to review the commission's decision was denied on February 19, 2003 by the California Supreme Court.

[39] See also *Kennick, supra*, 50 Cal.3d 297. The Supreme Court declined to remove Judge Kennick from office because of misconduct noting that "it seems likely that our public censure of each of petitioner's misdeeds would have led him to correct and improve his judicial behavior." (*Id.* at p. 341.) The Court did remove the judge from office for his persistent failure or inability to perform judicial duties.

> In sum, Doan has had three opportunities for reformation. She will have no more. [40]

Similarly, the Supreme Court in *McCullough, supra*, 49 Cal.3d 186, 199, in removing the judge from office noted:

> ...his failure to respond to our public censure evidences a lack of regard for the Commission, this court and his obligations as a judge.

In its decision ordering the removal of Judge Platt from the bench, the commission noted that "the failure of past sanctions to effect a change in conduct also suggests a lack of ability to reform and unsuitability for judicial office."[41]

Although the existence of prior discipline is a relevant factor, the Supreme Court has removed judges who had not been the subject of prior discipline.[42]

3. Appreciation of Misconduct

The third consideration is whether the judge appreciates the inappropriateness of his or her conduct. In *Fletcher, supra*, the Supreme Court noted that "contrary to the contrite tone he sounds in this court, petitioner's primary response to the misconduct allegations during the

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[40] *Doan, supra*, 11 Cal.4th at p. 340.

[41] *Inquiry Concerning Judge Michael F. Platt*, No. 162 (2002) at p. 15.

[42] See *Fletcher, supra*, 19 Cal.4th 865; *Kloepfer, supra*, 49 Cal.3d 826; and *Ryan, supra*, 45 Cal.3d 518.

Commission proceedings was to allege a conspiracy against him."[43] The Court concluded as to Judge Fletcher that:

> [T]he record "belies petitioner's claim that he has learned from past experience and has modified his courtroom behavior. It demonstrates instead an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in *every* case." (*Kloepfer, supra*, 49 Cal.3d at p. 866, fn. omitted, original italics)[44]

4. Likelihood of Future Violations

The fourth consideration is whether the judge is likely to continue to violate the Code of Judicial Ethics. The Supreme Court in its opinion removing Judge Fletcher from the bench concluded that the judge's perspective did not suggest that he had overcome his demonstrated lack of judicial temperament and, accordingly, similar incidents were likely to recur.[45]

In *Kloepfer, supra*, the Supreme Court in removing the judge noted that his "lack of judicial temperament is manifest" and stated:

> The record does not suggest that petitioner has, or will be able to, overcome this trait and that similar incidents will not recur. For this reason comparison of the discipline

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[43] *Fletcher, supra*, 19 Cal.4th at p. 919.

[44] *Id.* at pp.920-921.

[45] *Fletcher, supra*, 19 Cal.4th at p. 921, citing *Kloepfer, supra*, 49 Cal.3d at p. 866.

> imposed in other cases, as petitioner suggests, is not fruitful. Our role is to determine, in the individual case, the action necessary to protect the public and the reputation of the judiciary. The evidence fully supports the conclusion of the Commission that this purpose requires that petitioner be removed from the bench.[46]

In its decision to remove Judge Platt, the commission concluded that Judge Platt was "unlikely to conform his future conduct to the canons."[47] However, the commission issued a public censure of Judge Willoughby, rather than ordering removal, in part because it could not conclude that the judge's pattern of inappropriate conduct was "so continuing or pervasive as to preclude his reformation."[48]

5. Impact of Misconduct on the Judicial System

The fifth consideration concerns the impact of the judge's misconduct on the judicial system. How has the judge's misconduct prejudiced the judiciary's reputation or the actual administration of justice? This concern with the effect of the misconduct upon the integrity of and respect for the judiciary is inherent in the Supreme Court's determination in *Fletcher, supra*, that Judge Fletcher's removal was "necessary to protect the public and the judiciary's reputation."[49]

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[46] *Kloepfer, supra*, 49 Cal.3d at pp. 866-867.
[47] *Inquiry Concerning Judge Michael E. Platt*, No. 162 (2002) at p. 19.
[48] *Inquiry Concerning Judge W. Jackson Willoughby*, No. 154 (2000) at p. 16.
[49] *Fletcher, supra*, 19 Cal.4th at pp. 918 and 921.

In *Adams, supra*, the Supreme Court removed Judge Adams from the bench, noting that he had "engaged in successive extrajudicial transactions. . . creating an appearance of serious impropriety and thereby tending to diminish the public esteem of the judiciary – a consequence petitioner either deliberately ignored or was unable to appreciate."[50] The importance the Court gave to the impact of the misconduct on the judicial system becomes evident when contrasted with the considerable character evidence in support of Judge Adams[51] and Justice Mosk's strong dissent.[52]

The impact of the misconduct on the judiciary also has been recognized in other states as a factor in determining the appropriate level of judicial discipline. The Michigan Supreme Court has indicated that among the criteria to be used in evaluating judicial misconduct is that "misconduct

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[50] *Adams, supra*, 10 Cal.4th at 914.

[51] The Court noted:

Several judges and numerous attorneys testified to their perception of petitioner's outstanding legal and administrative skills, noting his significant contributions toward streamlining the court system and implementing a "fast-track" system.

Adams, supra, 10 Cal.4th at 911.

[52] Justice Mosk wrote:

All that the majority can say in support of removal is that, in their view, Judge Adams's "extrajudicial transactions" have "creat[ed] an appearance of serious impropriety" and have "thereby tend[ed] to diminish the public esteem of the judiciary. " (Maj. Opn. *ante*, at p. 914W) In so many words, they announce that he must be removed because of certain of his acts and omissions off the bench, even though he has in fact properly performed his judicial functions during his long tenure and, as the record shows, has actually increased his community's confidence in its judges. No reasonable person could agree. I surely cannot.

Adams, supra, 10 Cal.4th at p. 919.

that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety."[53] The Washington Supreme Court has listed as a factor in determining the appropriate discipline "the effect the misconduct has upon the integrity of and respect for the judiciary."[54] The Arizona Commission on Judicial Conduct has adopted a rule which lists factors that may be considered in determining appropriate disciplinary action including, "the nature and extent to which the acts of misconduct injured other persons or respect for the judiciary."[55]

6. Mitigating Factors

The Supreme Court has stated that character evidence and evidence of a judge's contributions to the judicial system does not mitigate or excuse misconduct, but may be considered in determining the appropriate discipline. In *Adams, supra*, the Supreme Court noted:

> The foregoing evidence of petitioner's qualifications for and contribution to the judicial system, during the course of a lengthy judicial career, does not mitigate or excuse petitioner's wilful misconduct or prejudicial conduct. (*Spruance v. Commission on Judicial Performance* (1975) 13 Cal.3d 778, 800 [(*Spruance*)].)

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[53] *In re Brown*, 626 N.W.2d 403, 405 (Michigan 2001).
[54] *In re Deming*, 736 P.2d 639, 659 (Washington 1987).
[55] Rules of the Arizona Commission on Judicial Conduct (effective January 1,2002), Rule 19 (Mitigating and Aggravating Factors), Subsection (d).

> We may, however, and do take these factors into account in considering the totality of the circumstances that are pertinent to our determination of the appropriate discipline. (See *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 539-540.[56]

In *Broadman, supra*, the Supreme Court reiterated that evidence that a judge is industrious and innovative does not mitigate or excuse willful or prejudicial conduct, and indicated that the commission had properly considered evidence in mitigation in the determination of the appropriate discipline.[57]

B. Applying the Criteria to Judge Van Voorhis

1. The Number of Acts of Misconduct

The commission and the masters conclude that Judge Van Voorhis had engaged in four acts of willful misconduct and seven instances of conduct prejudicial to the administration of justice that brings the judicial office into disrepute. These eleven incidents of misconduct took place between June 1999 and December 2000. The masters described the situation as follows:

> We conclude from the evidence that Judge Van Voorhis has a serious problem with judicial temperament and self-control. Witness after witness has come forward with believable testimony concerning abusive

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[56] *Adams, supra*, 10 Cal.4th at pp. 911-912.

[57] *Broadman, supra*, 18 Cal.4th at p. 1112.

> conduct by Judge Van Voorhis. The witnesses have run the gamut from public lawyers, privately retained counsel, new court staff, a member of law enforcement, a veteran court staffer and members of a jury. Unfortunately, Judge Van Voorhis allowed his impatience and seeming compulsion to display his judicial authority to embarrass, humiliate or simply humble those who cross him. Sadly, he has done this to lawyers in front of jurors creating the risk of having cases decided on other than the merits. On one occasion, Judge Van Voorhis embarrassed a lawyer with an accent in front of the client.

The masters also stated that the instances of misconduct were not isolated occurrences, but were indicative of a lack of judicial temperament. The masters wrote:

> The record establishes by clear and convincing evidence that Judge Van Voorhis's actions "cannot be characterized as occasional lapses or isolated instances of misconduct." Rather, there has been "a persistent pattern of abuse and arbitrary conduct. . . ." (*Kloepfer, supra*, 49 Cal.3d 826, 833.) In Judge Van Voorhis's case, the instances of misconduct have been "too numerous to permit us to speculate that [the judge] was guilty of misconduct only in isolated occasions which might be individually explained and excused."

(*Cannon v. Commission on Judicial Qualifications*, [(1975)], 14 Cal.3d 678, 705.)

2. Prior Discipline

Judge Van Voorhis was publicly reproved in 1992, received a private admonishment in 1994, and was advised orally and in writing by his presiding judge in early August 1999 that he still had a demeanor problem that needed to be addressed.

The 1992 public reproval included the following instances of unethical conduct by Judge Van Voorhis:

> In two criminal cases in May 1989 and April 1990, your conduct during questioning of a potential juror in each case caused that person to perceive a lack of sensitivity and to feel intimidated by your questioning.
>
> In October 1991, when arrangements for the loaning of the neighboring court reporter faltered, you entered the adjoining courtroom through a side door wearing your judicial robe and immediately directed that the court reporter be sent to your courtroom. Your inappropriate interruption of the proceedings was an abuse of authority.
>
> On two occasions, you gave directions to your court staff in a manner which was perceived as harsh.

> In two criminal cases in December 1989 and December 1990, you used a sarcastic and intimidating tone toward the attorneys appearing before you when they requested continuances.

The public reproval states that in determining that a public reproval "would be adequate discipline," the commission considered "the absence of prior discipline, your recognition that you should have handled the incidents differently, and your assurance that this conduct will not be repeated."

The 1994 private admonishment states that Judge Van Voorhis "issued Contra Costa subpoenas and signed them using his official judicial title in his own dissolution case in Solano County." Judge Van Voorhis's defense was that, although doing anything as a judge in his own case initially struck him as improper, he thought his act was a "mandatory ministerial act" and therefore, he could perform it even in his own case.

On August 4, 1999, as a result of Judge Van Voorhis's treatment of Ms. Carmichael (see Count Two B(I)), Presiding Judge Simons traveled to the Walnut Creek courthouse to meet with Judge Van Voorhis. The Presiding Judge memorialized the meeting in an August 5, 1999 letter to Judge Van Voorhis. The letter noted:

> Primarily, we discussed the incident involving Kim Carmichael on July 13. Before I mentioned any details relating to the incident, you indicated you were aware of my concern because you had been informed that an investigator was talking to

> individuals at the courthouse. You expressed great regret at the incident and described in some detail the many different efforts you have made since the CJP public reproval in 1992 to modify the ways you interact with staff

Presiding Judge Simons indicated that he was impressed with Judge Van Voorhis's "obvious sincerity in recognizing the problem raised by the incident with Ms. Carmichael and the need to resolve it." He explained that he believed "the issues I was aware of required me to bring them to your attention and to discuss ways to avoid repetition." The Presiding Judge mentioned two programs that Judge Van Voorhis might take, including a course on anger management. The letter noted that Judge Van Voorhis indicated that he would not follow up on the suggestions, "not because [he] rejected the need for such assistance, but that [he] felt [he] had adequate private resources to draw on for this assistance." The Presiding Judge's letter concluded: "I very much appreciated your attitude during the meeting, but must underscore my insistence that there be no repetition of these incidents."

Despite his reassurances to his presiding judge, within two weeks of the meeting, Judge Van Voorhis engaged in misconduct in the *Gotchall* trial by questioning the prosecutor's motives for seeking to introduce evidence, ridiculing her perspective in front of the jury and threatening to declare a mistrial if she continued. (See Count Two A(2).) With the exception of Judge Van Voorhis's comments in the *Silva* trial (Count Two A(l)) and his comments to Ms. Carmichael, all of the charged incidents of unethical conduct occurred after Judge Van

Voorhis met with Presiding Judge Simons. Whatever the effect of the public reproval and private admonishment on Judge Van Voorhis's conduct prior to the summer of 1999, his meeting with Presiding Judge Simons with its reference to his prior public reproval did not deter Judge Van Voorhis – in the words of the masters – from continuing "with the same issues of judicial temperament that have previously brought him to the attention of the Commission."

3. Appreciation of Misconduct

Judge Van Voorhis "acknowledges" that he should not have made some of the comments he did, but this is at best a conditional admission. in addition to challenging the masters' findings, Judge Van Voorhis in his briefs argued that "the conduct at issue here usually arose from an argument over a disputed evidentiary issue (or jury instruction) in the heat of the moment during trial, or it was the result of a failure of the court staff to adequately perform their duties."

In *Cannon*, *supra*, Judge Cannon proffered a similar defense when she sought to mitigate her misconduct on the basis of frustrations provoked by "inexperienced and sometimes disrespectful lawyers." The Supreme Court first found that the record did not support the judge's "claim that the numerous deputy public defenders involved in the misconduct charged and found to be true were disrespectful or that their inexperience reasonably could have frustrated petitioner or have provoked her unwarranted conduct." The Court noted that "[E]ven assuming arguendo that the evidence was clear and convincing, disrespect on the part

of the public defender cannot serve to justify petitioner's injudicious response."[58]

In *Gonzalez*, *supra*, the Supreme Court rejected the judge's attempt to blame the disciplinary proceedings on his detractors. The Court noted:

> In the final analysis Judge Gonzalez utterly fails to grasp either the substance or the seriousness of the numerous charges levelled against him by the Commission. Despite multiple admonitions and the normal evidentiary limitations of the hearing process, Judge Gonzalez has treated this investigation as an attack on his character. Thus he boasts he is opinionated, outspoken, hardworking, and extroverted, but never prejudiced and always impartial. He persists in his theory that his adversaries conspired to record his every misdeed and regards virtually every allegation as personally motivated. Rather than respond affirmatively and convincingly to the specific charges, he expends most of his defense effort in attacking the character and credibility of the adverse witnesses. While he concedes there may be certain minor irregularities in his judicial manner and procedures, he denies that he has ever deliberately abused his judicial office and

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[58] *Cannon, supra*, 14 Cal.3d at pp. 706-707, citing *McCartney supra*, 12 Cal.3d 512, 538.

> generally refuses to admit that he has done anything improper.[59]

The record here does not support Judge Van Voorhis's suggestion that his unethical conduct can be justified on the basis of "the heat of the moment" or by actions on the part of attorneys or court employees. To the contrary, the record indicates that Judge Van Voorhis fails to appreciate the inappropriateness of his conduct.

Ms. Brock did not provoke the conduct charged in Count One. Judge Van Voorhis chose to comment on his controversial ruling and to do so in such a way that it was reasonably perceived as indicating that he kept the evidence out to see how the prosecutor reacted. As previously noted, Judge Van Voorhis continued to give this impression in his testimony before the masters.

In his brief to the commission, Judge Van Voorhis stated that he regrets his comments to Mr. Gardner (Count Two A(l)) and suggests that this is a "significant fact in mitigation." The judge's testimony, however, was somewhat equivocal[60] and there is no indication that the judge ever apologized to Mr. Gardner.

There is little in the transcript to suggest that Ms. McMurray provoked Judge Van Voorhis's comments

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[59] *Gonzalez, supra*, 33 Cal.3d at p. 377.

[60] On the third day of the hearing before the masters, Judge Van Voorhis's counsel asked him, "Do you acknowledge that you said to Mr. Gardner words to the effect, 'Where did you learn that in law school?" Judge Van Voorhis's response was: "I do. It's, again, something that I regret and that I could say it better now. You know, I should have directed it in connection with having a colorable basis for asking the question, and I should have made that comment outside the presence of the jury."

(Count Two A(2)). She honestly and reasonably believed that the evidence was admissible. When Judge Van Voorhis indicated that Ms. McMurray could not qualify the police officer as an expert, Ms. McMurray twice offered to move on and then asked to approach the bench.[61] There was no provocation for Judge Van Voorhis's response.

There is no indication that Judge Van Voorhis recognizes the impropriety of his comment to Mr. Alvear (Count Two A(3)). The masters explained that their conclusion of prejudicial conduct was based on how an "objective observer" would perceive the comment, and not on the judge's intent or motivation. Judge Van Voorhis's response, however, focused solely on his intent. His obliviousness toward appearances is also reflected in his letter of April 11, 2000 to the Contra Costa Public

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[61] The transcript records the following exchange:

MS. McMURRAY: If – I wasn't aware that the Court wouldn't qualify her, based on her training and the times that she had administered the test, so if you would like me to move on, I am more than
JUDGE VAN VOORHIS: Many times, she has seen a person demonstrate some sort of symptom. That doesn't necessarily connect it with alcohol. ¶ Probably everybody she has ever arrested has a smaller finger on the end of their hand. That doesn't mean that everybody with a small finger is drunk.
MS. McMURRAY: So if this Court is not willing to qualify officers as experts, I will move on.
JUDGE VAN VOORHIS: That doesn't really solve the problem completely, because you went down a road that you could not complete, and now this jury has heard about gaze nystagmus, and they are supposed to wonder what it all means.
MS. McMURRAY: If we could approach the bench, I think that's probably appropriate.
JUDGE VAN VOORHIS: And what would you tell me up here?
MS. McMURRAY: I have questions of the Court.
JUDGE VAN VOORHIS: Ask me now.

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Defender in response to his letter complaining about the comment to Mr. Alvear. Despite knowing that the matter had been referred to the commission, Judge Van Voorhis commenced his letter with the sentence, "Why does it seem that whenever I go on vacation, the first day back at work is particularly difficult, wiping out the benefits of my relaxing time?" This opening, as well as his closing,[62] suggests that Judge Van Voorhis has little awareness of how his statements are reasonably perceived.

The inexperienced prosecutor in the *McDonald* case (Count Two A(4)) did nothing to provoke Judge Van Voorhis. She asked about the defendant's probation status after the defendant denied that he had been convicted and after the defendant requested that the prosecutor repeat her question. When Judge Van Voorhis asked Ms. Meade where she had learned that a defendant's probationary status was admissible, she apologized. Rather than accept the apology, Judge Van Voorhis impugned her motives ("And so were you just guessing what you could get away with in a courtroom?").

Judge Van Voorhis does not admit that his comments were unethical. He argues that the potential prejudice from the prosecutor's inquiry into the defendant's probationary status was great and required the court's immediate

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[62] The letter concludes with the following paragraph:

I know that another meaning of "maturity" has to do with aging and the ripening of character that comes with the passage of time and the accumulation of experience. Being expected to be almost without imperfections has a way of aging a person. Hopefully, I can make it through the few years of my legal career which remain and make it to retirement in one piece. Thank you for your letter encouraging me to do better.

intervention. The judge's misconduct, however, was not his determination not to allow the inquiry, but his demeaning, rude and abusive behavior toward the prosecutor. Judge Van Voorhis's failure to address the manner in which he acts suggests that he believes that as long as his subjective intent is proper there are no ethical limits on how he expresses himself

Judge Van Voorhis also does not admit to any unethical conduct in his order that Ms. Brock admit to the jury that certain evidence "does not mean anything" (Count Two A(S)). He contends that he was protecting the defendant's constitutional right to a fair trial. Again, the misconduct is not Judge Van Voorhis's decision to exclude evidence of the gaze nystagmus test, but his demeanor and insistence that the prosecutor admit to the jury that she was wrong. By focusing solely on his subjective motive, Judge Van Voorhis fails to indicate any appreciation for ethical constraints on the manner in which he acts.

The gap between Judge Van Voorhis's subjective intent and his actions also is reflected in his comments in *Elze* concerning the relevance of evidence of the defendant's drinking habits (Count Two A(6)). Although the defense counsel who initially proffered the evidence wasn't sure the evidence was really relevant, Judge Van.Voorhis insisted that it was, and then insisted that the prosecutor, who had objected, admit that it was relevant. Before the masters and the commission, Judge Van Voorhis contended that he had sought to give the prosecutor an opportunity to object under Evidence Code section 352. There is nothing in the record to suggest that anyone in the courtroom, other than Judge Van Voorhis, could have been aware of the judge's purported intent.

Although Judge Van Voorhis honestly may not recall throwing the files down, he might still have apologized for his demeanor toward Ms. Carmichael (Count Two B(l)). Instead, he has offered as defenses that Ms. Carmichael, a fill-in clerk, did not properly check his calendar for jury trials later in the week and that in the afternoon certain defendants were not properly directed to his court. He also argues that he did not know that the throwing of the files was the problem. However the testimony before the masters and Presiding Judge Simon's letter indicate that when Judge Simon met with him, Judge Van Voorhis immediately provided him with his version of the events. Again, the issue was not Judge Van Voorhis's intent, but his demeanor.

Judge Van Voorhis's obliviousness to his demeanor is apparent in his response to the allegations in Count Two B(2) concerning his comments to Ms. Van Horn about swearing in the bailiff. After hearing all the testimony concerning his demeanor, Judge Van Voorhis testified that he spoke to Ms. Van Horn in a "conversational tone." In addition, Ms. Van Horn testified that when she and another clerk went back into the courtroom to show Judge Van Voorhis that the manual did not indicate how the bailiff should be sworn in, Judge Van Voorhis ignored them for approximately 15 minutes until they left, preferring to focus on an extended conversation he was having with a student. Judge Van Voorhis denies that he ignored them, but his testimony indicates that he was aware of their presence and chose not to acknowledge it.

Judge Van Voorhis never apologized to Deputy Brown for telling her in open court and before an incarcerated defendant that she needed to leans how to do her job (Count Two B(3)). Judge Van Voorhis never asked Deputy

Brown why the inmate was not transported nor did he inquire why he had not been told that the inmate would not be transported. if he had, he would have learned that Deputy Brown had promptly told Judge Van Voorhis's bailiff, Deputy La Fortune, and that Deputy La Fortune – whom Judge Van Voorhis announced would train Deputy Brown – had failed to tell the judge or to instruct Deputy Brown to tell the judge.

Judge Van Voorhis's failure to appreciate the context in which he presides also is apparent from his comments to the juror in *Sowande* (Count Two C). Judge Van Voorhis carefully worked out his response to the jury's question with counsel and gave counsel the option of having the jury return to the courtroom to hear the answer. He then decided – without consulting the attorneys and prompted apparently by some suspicion of defense counsel's motives (which were never disclosed to counsel) – that he needed to give the jury some reason for being brought back into court and decided to chastise the jury for the lack of clarity in its question.

Finally, Judge Van Voorhis's lack of appreciation of his misconduct is reflected in his testimony concerning his 1992 assurance to the commission that his misconduct would not be repeated. When questioned before the masters, Judge Van Voorhis could not say that he had given any such assurance.[63] This failure to remember his

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[63] In the following exchange during his appearance before the commission, Judge Van Voorhis admitted he had given the commission an assurance.

COMMISSION CHAIR (Judge Risë Jones Pichon): Judge Van Voorhis, I have a question. ¶ In 1992, you were publicly reproved by the Commission, and in that reproval, Ms. Henley indicated that the Commission determined that a public reproval was adequate discipline

assurance suggests that Judge Van Voorhis either did not consider it important or did not think it was relevant to his more recent misconduct.

4. Likelihood of Future Violations

The commission is of the opinion that it is not only likely, but close to a certainty that Judge Van Voorhis, if allowed to remain on the bench, will continue to violate the Code of Judicial Ethics, This conclusion is compelled by Judge Van Voorhis's failure to appreciate the inappropriateness and importance of his manner of acting, his defense to the allegations, his statements to the masters, his failure to present any evidence of steps taken to avoid future violations, and his oral presentation to the commission.

It is very difficult for a judge to avoid repeating an ethical violation unless he or she recognizes the act as

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for a few reasons, one of which was your assurance that this conduct would not be repeated. ¶ In this case before the hearing before the special masters, you were asked by Mr. Coyle whether you promised the commission that the conduct which caused the reproval would not be repeated. And you said, "I can't tell you what assurance I gave them." And you were asked many questions about this, but you never agreed that you made such an assurance. ¶ If you were asked this question today, what would your answer be?
JUDGE VAN VOORHIS: I gave that testimony under oath, and I was in no position to tell you with 100 percent certainty what happened.
COMMISSION CHAIR: But you can tell us today –
JUDGE VAN VOORHIS: If you will notice that –
COMMISSION CHAIR: But can you tell us today what your assurance was?
JUDGE VAN VOORHIS: Since the testimony, 1 have researched and I did give such an assurance. And I'm able now to say with 100 percent certainty, yes, I *did.* But at the time, 1 was not able to give that testimony.

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misconduct. Of course, a judge may not have intended the violation or may not have initially recognized that the act constituted misconduct. In a disciplinary proceeding, however, a judge is well advised to maintain alternate defenses. First, the judge may, and should – if he or she so believes – maintain that the act was not a violation of the Code of Judicial Ethics. Second, the judge should indicate that despite any lack of improper intent at the time, he or she now recognizes how the act could be perceived as unethical. Otherwise, should it ultimately be determined that the act was unethical, there may be serious concerns that the judge is likely to repeat the violation.

Judge Van Voorhis, while stoutly arguing that he has not engaged in any misconduct, has provided little evidence that he appreciates how the masters and the commission could find eleven instances of misconduct. Judge Van Voorhis does admit that he could have done some things better, but the commission perceives little appreciation of the factors that gave rise to this disciplinary proceeding. For example, Judge Van Voorhis has shown no awareness of how his comments to Ms. Brock (about his ruling to exclude evidence) and to Mr. Alvear (to lose the accent) could be perceived as unethical (even assuming his good intent). Instead of indicating that he will try to improve how he addresses staff, Judge Van Voorhis maintains that he spoke to Ms. Van Horn in a "conversational tone." Although Judge Van Voorhis maintains that he did not consciously belittle an attorney in front of the jury, there is little to suggest that in the future he would refrain from making comments in front of a jury.

The commission's concern is supported by Judge Van Voorhis's comments to the masters. While Judge Van Voorhis was being questioned concerning his comments to

Ms. McMurray before the jury (Count Two A(2)), the following colloquy took place:

> JUSTICE HOLLENHORST: That position is also undermined however by the fact that, when you decide to query an attorney, that you do so in front of the trier of fact, which has the potential for diminishing this lawyer's value or credibility in front of the trier of fact or the client. Isn't that true?
>
> JUDGE VAN VOORHIS: It is. And again, what I feel has happened in the course of my career is that I think I show more of my feelings the longer I stay on bench. And I have to now factor that into my decision as to whether or not to conduct these discussions in open court in the presence of a jury. ¶ Whether or not I simply fooled myself earlier in my career that these things weren't being seems or whether I was oblivious to it or whether or not I really did at that time have better skills than I did at this phase - - but what I hope to present to the Commission, to your folks, is that these experiences for me were pretty unusual. I was pretty astonished at the approach that's being taken by these lawyers. ¶ It's not that I hadn't ever seen it before, but it - - I think it caused an unusual reaction. Not unusual for a human being, but I have expressed it the best I can.

Judge Van Voorhis's honest statement is tantamount to an admission that the longer he stays on the bench the more

likely it is that he will lose control.[64] Furthermore, contrary to Judge Van Voorhis's perception of the situation as "unusual," both the masters and the commission found that Ms. McMurray did nothing to justify Judge Van Voorhis's conduct.

Later in the proceedings, while Trial Counsel was examining Judge Van Voorhis concerning his meeting with Judge Simon, the following dialogue took place:

> MR. COYLE: I believe your response to Judge Simon, you said, "I recognize the need to resolve this problem"; correct?
> JUDGE VAN VOORHIS: Yes.
> MR. COYLE: What problem?
> JUDGE VAN VOORHIS: The problem he and I discussed is that people often misunderstand me. They don't perceive really where I'm coming from, what I'm about, and what it means when I do what I do.
> MR. COYLE: So that's the problem, people don't understand you?
> JUDGE VAN VOORHIS: I think it would be easier for people to deal with me if they did understand me.
> MR. COYLE: But you don't have a problem?
> JUDGE VAN VOORHIS: Understanding me?
> MR. COYLE: You don't have a demeanor problem?

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[64] It might be rioted that Judge Van Voorhis's response brief to the commission states, "Judge Van Voorhis has been working to control his demeanor and was successful for approximately eight years."

JUDGE VAN VOORHIS: Are you asking me my opinion of whether I have a demeanor problem?

MR. COYLE: Yes. Yes, I am.

JUDGE VAN VOORHIS: I think that I'm special compared to other people in that category. And I – I don't think it's nice to use the word "special" because it means that I'm not like other – the average person, not like the average person or other people in general in that category.

MR. COYLE: Can you expound on how you're special in that regard?

JUDGE VAN VOORHIS: Well, I referenced my sleeve, I think.

MR. COYLE: I'm sorry. You referenced what?

JUDGE VAN VOORHIS: My sleeve. I think that my emotions are closer to the surface, so to speak, than other people's are.

JUSTICE HOLLENHORST: What does that mean?

JUDGE VAN VOORHIS: That I don't think that the behavior means the same for me as it does for you.

JUSTICE HOLLENHORST: Then you misunderstand or mistake signals from other people?

JUDGE VAN VOORHIS: No. I think they mistake them - I think they mistake them from me. Because if they were to say to themselves, take what he is showing you and divide it by some number - say, two or ten - and then consider that's what he's displaying. And if you do that, maybe you understand better what it is that I'm trying to portray, what feeling I'm trying to portray in what I do because - you've heard of

> the phrase 110 percent. I think most of my life people have said that I try too hard and that, if I aimed at 80 percent, I would look pretty optimistic.

Again, while Judge Van Voorhis is frank, his perspective suggests that further incidents will arise as he admits that he is emotional and that people misunderstand him, but he fails to take responsibility for controlling his emotions or being concerned with how he is perceived.

In light of Judge Van Voorhis's admissions, one might have expected him to present some evidence of steps he had taken to control his feelings. However, the record contains only Judge Simon's letter suggesting that Judge Van Voorhis take an anger management program for executives and indicating that Judge Van Voorhis declined the suggestion because he had "adequate private resources to draw on for this assistance." There is no evidence that Judge Van Voorhis took any judicial education classes. There was no evidence, other than Judge Van Voorhis's self-serving argument, [65] that he had changed his manner of addressing counsel or staff.

Any doubts that the commission may have had as to the likelihood of repetition were dispelled by Judge Van Voorhis's oral presentation to the commission. Judge Van Voorhis argued that he was not like the commission members and was afraid of being "misjudged."[66] He went

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[65] In his oral presentation to the commission Judge Van Voorhis spoke of handling 64 jury trials in the last 18 months and opined that he "handled things better," but there is nothing in the record to support these representations.

[66] Judge Van Voorhis stated:

> In your evaluation of me, I'm worried about being misjudged. I'm not like you. If I seem completely different than you are,

on to argue that as long as he had a "good" subjective intent, the commission could not find that he had proceeded in "bad faith," and could not remove him from office.[67]

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would that by itself make you dislike me? It sounds silly doesn't it? Being different can ignite a special tension if you let it. Conformity feels secure, so most people are naturally attracted to being part of the group, to blending in. And it's easier to understand and communicate with someone who sounds like you, so we're comfortable with people from our own group. But differences between people shouldn't bother anyone. People from different parts of the world with different patterns of speech and ways of thinking shouldn't be poorly treated because they're different. Ethnic bias is unjustifiable. Isn't the phenomenon a ridiculous paranoia that we should all try to eliminate. Please nod with me.

[67] Judge Van Voorhis engaged in the following dialogue.

COMMISSIONER KAHN: Following your logic, so long as you have a good purpose in mind, do you think that you can behave in any way that you feel is appropriate under the circumstances and you have immunity from removal so long as you're acting with good purpose?

JUDGE VAN VOORHIS: The Supreme Court has not decided whether reckless disregard of a judge's duty would constitute bad faith.

COMMISSIONER KAHN: So in other words, you think that you can make as many demeanor mistakes as can happen and there's no limit to the number of demeanor mistakes you make, and you can't be removed because they were just done with the good purpose? Is that your position?

JUDGE VAN VOORHIS: Are you asking if it's my position legally or are you asking me my own personal opinion?

COMMISSIONER KAHN: As I understood it, you were suggesting that removal was inappropriate. And I'm asking you whether you think you are immune from removal regardless of how many mistakes you make so long as those mistakes are made in good faith.

JUDGE VAN VOORHIS: Without bad faith, a judge cannot be removed from office for demean-or purposes. That is the legal position that I asked my advocate to take. I have not ever stated

Regardless of the legal merits of his argument, Judge Van Voorhis left the impression that he believed his good faith so mitigated his misconduct that he would not hesitate to commit similar ethical violations in the future as long as he was convinced in his own mind that he had a good intent.

5. Impact of Misconduct on the Judicial System

The fifth consideration concerns the impact of the judge's misconduct on the judicial system. The commission agrees with the masters that Judge Van Voorhis's misconduct not only compromises the appearance of the integrity of the judiciary, but actually interferes with the administration of justice. The masters noted that Judge Van Voorhis:

> ...in the various hostile exchanges with counsel not only demonstrated a lack of judicial temperament to counsel but jeopardized the parties' right to a fair and impartial verdict based on only the evidence and not on sympathy for the attorney victim of the judge's wrath or the offers of proof and speaking objections that the court routinely entertained in front of the jury.

The masters also noted that Judge Van Voorhis's criticism of the jury's question (Count Two C) "almost affected the outcome of the case because [the jury foreman] was so upset that he considered deciding the case on grounds other than the evidence."

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what I think personally, and I don't think it's appropriate for me to do that.

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The commission further notes that Judge Van Voorhis's misconduct, however it is characterized, seriously undermines the public's confidence in and respect for the judicial system. The public looks to judges to set the tone of judicial proceedings. When a judge mistreats staff, belittles counsel or gives vent to his or her anger or frustration, the audience is not only concerned about the result in the specific matter before the court, but worries that other parties, lawyers, jurors and employees will be subjected to similar mistreatment.

6. Mitigating Factors

In his briefs to the commission, Judge Van Voorhis offered as a mitigating factor his good judicial character as attested to by the attorneys who came forward on his behalf. Other possible mitigating factors are Judge Van Voorhis's industriousness and efficiency as a judge, his intensity and his years on the bench.

The commission respectfully finds little weight in these factors. Of the eight attorneys who came forward on Judge Van Voorhis's behalf only five had tried more than one case before the judge. These five related that Judge Van Voorhis was extremely hard-working and efficient.[68] They did not volunteer their opinions as to the judge's demeanor, and when asked, their responses were qualified.[69] The

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[68] In *Cannon, supra*, 14 Cal.3d at p. 706, the Supreme Court noted: "it is manifest in any event that a lack in the quality of justice cannot be balanced by the fact that justice, such as it is, is administered in large quantities."

[69] One attorney testified that he once had a case in which he thought the jury was "swinging away" from him because of the interaction Judge Van Voorhis was having with the prosecutor. Another lawyer testified that if an attorney was not prepared, Judge Van Voorhis would call the attorney on it and scold the attorney.

testimony of the only judge other than Judge Van Voorhis to appear in the proceedings did not support Judge Van Voorhis.[70]

Judge Van Voorhis's intensity and his years on the bench weigh against him as much as in his favor. His intensity may have contributed to his reputation for being hard-working and efficient, but it also appears to have contributed to his impatience and his inability to appreciate the perspectives of others. The fact that Judge Van Voorhis is a seasoned judge might be a mitigating factor were there only one or two instances of misconduct. Where, however, there is a pattern of misconduct following prior discipline, the judge's persistence suggests that he is unlikely to correct his behavior.

C. Removal is the Appropriate Discipline

Judge Van Voorhis contends that because his intent was always to do justice, the commission cannot make a finding of "bad faith" and hence his misconduct cannot be characterized as "willful misconduct" and the commission cannot remove him from office.

As a matter of law, this argument is incorrect. The California Constitution clearly authorizes the commission to remove a judge for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[71] In 1973, when the Supreme Court was first

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[70] Justice Simons (the presiding judge in 1999) testified that he used Judge Van Voorhis less and less in Martinez as time went on because "the benefits began to be outweighed by the problem-solving [that] was required after he helped out."

[71] Article VI, section 18(d) of the California Constitution states that the commission may

flushing out the differences between "willful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," it noted:

> It should be emphasized that our characterization of one ground for imposing discipline as more or less serious than the other does not imply that in a given case we would regard the ultimate sanction of removal as unjustified solely for "conduct prejudicial to the administration of justice which brings the judicial office into disrepute."[72]

In *McCullough, supra*, the Supreme Court, citing Geiler, reiterated that prejudicial conduct, although "less grave" than willful misconduct, "may nevertheless, by itself, justify removal."[73]

The more difficult question is whether Judge Van Voorhis should be removed from office for what he calls violations of demeanor. The commission concludes that Judge Van Voorhis should be removed from office.

First, it may well be that Judge Van Voorhis did not set out to violate the Code of Judicial Ethics. Nonetheless, the record shows that on at least four instances he lost his temper and vented his anger or frustration in ways that

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...censure a judge or former judge or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term or of the former judge's last term that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

[72] *Geiler, supra*, 10 Cal.3d at p. 284, fn. 11.

[73] *McCullough, supra*, 49 Cal.3d at p. 191.

compromised the administration of justice and the integrity of the judiciary. The "fact" that a judge does not intend to lose his or her temper does not excuse the judge from taking responsibility for what the judge says or does when angry or frustrated.

Second, the four instances of bad faith and seven instances of prejudicial misconduct are much more than just poor demeanor. They present a pattern of abuse of authority, embroilment and appearances of impropriety. In addition, in several instances the masters found witnesses' testimony more credible than Judge Van Voorhis's contrary testimony.

Third, prior discipline and warnings have not resulted in Judge Van Voorhis modifying his behavior. Judge Van Voorhis was previously publicly reprimanded for similar misconduct and was again warned verbally and in writing by his presiding judge that he continued to have a demeanor problem.

Fourth, Judge Van Voorhis's misconduct not only compromises confidence in the integrity of the judicial system, but also potentially interferes with the administration of justice and hurts people. Jurors heard inadmissible evidence, attorneys' credibility was improperly compromised in front of juries, and at least one juror considered not deciding a case on the evidence because of the judge's insult. Also attorneys, staff members and jurors were humiliated.

Fifth, as noted, Judge Van Voorhis does not appear to recognize how the way he speaks and acts violates the Code of Judicial Ethics. The thrust of his defense ins this proceeding has been that he meant no harm and that others misunderstand him.

Sixth, (1) because Judge Van Voorhis does not understand his misconduct, (2) because he has not presented any evidence of steps taken to learn about his misconduct or to control it, (3) and because he frankly admitted that the longer he is a judge the more likely it is that he will "show his emotions," the commission is convinced that Judge Van Voorhis will continue to violate the Code of Judicial Ethics if he is allowed to remain on the bench.

In its opinion removing Judge Wenger from office, the Supreme Court noted:

> There is no evidence that he neglected his work or used his office for illicit gain. As the master observed, "his fault lay more in his over-zealous performance of his duties." Petitioner candidly admitted he had a "bull headed approach" and was "more concerned about substantiating [his] contentions in a matter than being correct."[74]

The Court further noted that in his final testimony before the masters, Judge Wenger was "laudably contrite."

> At last he saw the reasons of his making and repeating many mistakes lay in himself and in "that part of my personality that has blinded me to the realization that I'm not right. I've striven to support my position without realizing that there is more to it."[75]

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[74] *Wenger, supra*, 29 Cal.3d at p. 653.

[75] *Id.* at p. 654.

The Court, however, determined that mitigation of wrongdoing "requires more than an unfulfilled intent to reform," and concluded that as the aim of the disciplinary proceeding was not punishment but "to protect the judicial system and the public which it serves from judges who are unfit to hold office," faithfulness to that aim required removal.[76]

There is no evidence that Judge Van Voorhis "neglected his work or used his office for illicit gain." Judge Van Voorhis's own testimony before the masters and the commission suggests a zealous, if not overzealous, performance of his duties. However, unlike Judge Wenger, Judge Van Voorhis has failed to explicitly accept responsibility for his misconduct.

The commission concludes that the record in this case – as did the records in *Kloepfer, supra*, and *Fletcher, supra* – demonstrates "an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in every case," and does not suggest that Judge Van Voorhis "has, or will be able to, overcome [his demonstrated lack of judicial temperament] and that similar incidents will not recur."[77]

The commission is mindful of the impact of its determination on Judge Van Voorhis, but its mandate directs the commission not to focus on punishment, but on the protection of the public, the enforcement of rigorous standards and maintenance of public confidence in the

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[76] *Ibid.*, citing *McComb v. Commission on Judicial Performance* (1977) 19 Cal.3d Spec. Trib. Supp. 1, 9.

[77] *Fletcher, supra*, 19 Cal.4th at p. 921 (original brackets), citing *Kloepfer, supra*, 49 Cal.3d at p. 866.

integrity of the judiciary.[78] In light of the evidence of misconduct, the judge's prior discipline, the judge's lack of appreciation of his misconduct and the likelihood of repetition, faithful adherence to this mandate compels that future parties, staff employees and attorneys not be subjected to Judge Van Voorhis's misconduct. In reaching this conclusion the commission notes that the Supreme Court has removed judges from the bench for conduct that did not rise to the level of moral turpitude, dishonesty or corruption.[79]

CONCLUSION

The commission has found that Judge Van Voorhis committed four acts of willful misconduct and seven acts of prejudicial misconduct. Judge Van Voorhis seeks to minimize his misconduct by characterizing it as a demeanor problem, but his "demeanor problem" is much more than being impolite. It includes such "demeanor" misconduct as loss of judicial temperament, abuse of authority and embroilment. The commission has found that this misconduct occurred after the judge had been publicly

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[78] In *Geiler, supra*, 19 Cal.3d at p. 287 the Supreme Court noted that the judge's "removal from office is required more by the high standards of judicial office than by his personal failings."

[79] See *Gonzalez, supra*, 33 Cal.3d at p. 378. ("Because we do not find that Judge Gonzalez' misconduct rises to the level of moral turpitude, dishonesty, or corruption, we order that despite his removal from office he be permitted to practice law in California, on condition that he pass the Professional Responsibility Examination required of applicants seeking readmission or reinstatement to the bar.") Also *Geiler, supra*, 10 Cal.3d at p. 287. ("Much evidence was adduced before the Commission of petitioner's diligence in the work of the law, and his unjudicial conduct cannot he said to amount to moral turpitude, dishonesty or corruption.")

reproved for similar conduct, and had received a separate private admonishment. Furthermore, all but two of the incidents occurred after an incident which reminded Judge Van Voorhis of his public reproval and caused his presiding judge to meet with Judge Van Voorhis and warn him that his misconduct must not be repeated. The commission has also found that Judge Van Voorhis does not appreciate the inappropriateness of his misconduct and that there is a strong likelihood that if he is allowed to remain on the bench he will commit future violations of the Code of Judicial Ethics. These conclusions are compelled by Judge Van Voorhis's frank admission that the longer he is on the bench the more difficult it is for him not to lose his temper, and by his failure to recognize that his subjective good intent does not allow him to abuse his authority, become embroiled in matters or lash out at employees or attorneys. Finally, the commission finds that Judge Van Voorhis's misconduct not only brings the judicial office into disrepute, but has also interfered with the administration of justice in particular cases. In sum, the record demonstrates "an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in *every* case."[80] Accordingly, the commission cannot, consistent with its mandate to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the judiciary, allow Judge Van Voorhis to continue on the bench.

This decision shall constitute the order of removal of Judge Bruce Van Voorhis and pursuant to the provisions of article VI, section 18 of the California Constitution and rule

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[80] *Fletcher, supra*, 19 Cal.4th at pp. 920-921, citing *Kloepfer, supra*, 49 Cal.3d at p 866, fn. omitted, original italics.

120(a) of the Rules of the Commission on Judicial Performance, Judge Bruce Van Voorhis is hereby disqualified from acting as a judge.

Commission members Judge Risë Jones Pichon, Ms. Lara Bergthold, Judge Madeleine I. Flier, Mr. Michael A. Kahn, Mrs. Crystal Lui, Mrs. Penny Perez, Ms. Barbara Schraeger, and Dr. Betty L. Wyman voted in favor of all the findings and conclusions expressed herein and in the removal of Judge Bruce Van Voorhis from judicial office. Commission members Justice Vance Raye and Ms. Ramona Ripston dissent in part from the commission's decision. Commission member Mr. Marshall Grossman did not participate in this matter.

Dated: February 27, 2003

/s/_____
Honorable Rise Jones Pichon
Chairperson

Commission member Justice Vance W. Raye expresses the following opinion.

I concur with my colleagues on the essential principles of judicial decorum that should guide our decision in this case. Rudeness, arrogance, and nastiness have no place in the courtroom. The increasing lack of civility among lawyers is a frequent topic of legal commentaries; judicial incivility is no less reprehensible. A judicial appointment is not a license to insult and demean. Indeed, judges, who are shielded from intemperate attorneys by rules of attorney discipline and the contempt power, should set the standard for courtroom demeanor and conduct. On those principles there can be little disagreement. Our task, however, is not to compose ethical maxims but to apply them. Ultimately, we must determine whether respondent's actions can be properly characterized as misconduct and, if so, must decide on an appropriate sanction.

Clearly, not every discourteous act constitutes willful misconduct, and not every act of misconduct warrants the ultimate sanction of removal. Indeed, the extreme sanction of removal is appropriate only if essential to public protection. I differ with the majority's characterization of certain acts committed by Judge Van Voorhis. Those differences, however, are of relatively minor significance. Of greater importance is my conviction that respondent's actions, no matter how characterized, do not warrant the extreme sanction of removal from office. For that reason, I must respectfully dissent.

Despite our disagreements, my colleagues and I share a common perception of respondent based on the record and his presentation to the commission: Judge Van Voorhis is not a warm and fuzzy individual. His sharp edges are plain

and visible and he makes no effort to conceal them. He speaks his mind with bluntness and candor and appears to be neither ingratiating nor endearing. This should not matter. Affability is not a qualification of judicial office. We have not been empowered to cull the judiciary of persons who lack congeniality; that discretion is left to the appointing power, in the first instance, or the voters who may express a preference for a more likeable candidate. Our power is tethered to the judge's conduct, not his personality.

The judge's conduct here can be summarized thusly. Following trial in *People v. Elze*, respondent made comments to a young prosecutor that created the impression his earlier decision on a legal issue was not based on the merits but was calculated to teach the new lawyer how to handle adversity. During trial in *People v. Silva*, respondent excoriated an inept attorney in a voice that was condescending, disrespectful, and contemptuous. In *People v. Gotchall*, he again adopted a hostile and condescending tone in reprimanding a young district attorney for what he perceived to be an effort to circumvent his evidentiary ruling concerning the horizontal gaze nystagmus test.[81] The judge's understanding of the evidentiary foundation necessary for introduction of the horizontal gaze nystagmus test was also the source of

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[81] I note, however, defense counsel observed he didn't believe that Judge Van Voorhis raised his voice or was harsh or discourteous, contrary to the deputy district attorney's observation of a "smirk" on respondent's face. The masters "independently reviewed the transcript" and sided with the deputy district attorney. Regrettably, an independent review of a written record cannot discern smirks or vocal intonations. Nevertheless, for purposes of this dissent, I accept the masters' finding.

friction in *People v. Elze*.[82] Again, the judge made a ruling and perceived an effort by the prosecutor to circumvent the ruling. He angrily objected to the prosecutor's questioning and instructed her to tell the jury to disregard the answer. In a separate case involving the same prosecutor, he disagreed with the prosecutor's objection on an evidentiary matter and instructed her, in front of the jury, to agree with his ruling. In *People v. McDonald*, respondent again undertook to teach a young prosecutor rules of evidence, interrupting and questioning her in front of the jury in a manner that could only be described as demeaning and sarcastic. Following the trial of *People v. Hoye* in January 2000, respondent volunteered to the young public defender trial deputy that his accent was charming but he should "lose it."

In three other matters involving court staff, respondent is accused of throwing files in a fit of anger, with some of the files landing on a clerk's workspace; castigating a clerk in front of a jury for wasting the court's time; and chastising a deputy sheriff for not knowing her job, though his criticism was not warranted and her conduct could have been explained had he only asked. In a single matter involving a jury, he criticized members of the jury for the wording of a question they submitted, telling them, "you could improve on your English, and therefore your question could be way more precise for me." Some jurors felt insulted by the comment.

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[82] The judge appears to have been wrong in his rulings on the test. It is difficult to disregard this legal error in assessing his conduct. However, for purposes of my analysis, I have assumed that his ruling was correct, in which case his righteous indignation with the prosecutor's response to his rulings may have been warranted. Nonetheless, respondent was still under an obligation to act courteously and to treat the participants with dignity and respect. He did neither.

There is no doubt that respondent was intemperate in his remarks and his actions, that the objects of his tirades were embarrassed and humiliated, and that many of his words should have best been left unsaid. Respondent's regrettable conduct speaks for itself. For that reason, I offer a mild dissent from efforts to amplify the seriousness of respondent's lapses in regard to his angry outbursts at counsel by labeling them as "willful misconduct." According to the majority, a judge's "lashing out at counsel" constitutes bad faith under two of the three tests for bad faith articulated by the Supreme Court: First, according to the majority, comments made to vent anger or frustration cannot be said to have been made in the "faithful discharge of judicial duties" and thus were made for a "corrupt purpose." Second, because respondent had recently been cautioned about his demeanor, his subsequent loss of poise evinced a "conscious disregard for the limits of the judge's authority."

I am not persuaded by either of these justifications. Certainly the conduct here is no worse than the judge's conduct *in Kennick, supra*, 50 Cal.3d 297. There, the commission found the judge screamed in an abusive manner at an attorney in open court when she attempted to make a bail motion and screamed at her again in chambers when she suggested the court reassign counsel in certain cases to expedite the calendar. Further, the commission found that the yelling so intimidated the attorney that she felt she could never make another bail motion before petitioner, and the yelling in chambers frightened her and reduced her to tears. The masters concluded this conduct constituted prejudicial conduct; the commission concluded it constituted willful misconduct, The Supreme Court concluded it was only prejudicial conduct, declaring, "The

evidence does not establish clearly and convincingly that the acts in question were committed for a purpose other than the faithful discharge of judicial duties and thus amounted to more than spontaneous outbursts." Perhaps our respondent's outbursts were more protracted, but they were spontaneous in origin and derived from the same motivation – anger and frustration.[83]

I also do not agree that respondent's comments to the jury constituted misconduct. As our Supreme Court has suggested, "It is sometimes difficult to determine the line between 'extremely poor taste' and 'conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[84] Jurors are the lifeblood of the court system. Performing a civic duty for a pittance, they should be praised, not ridiculed. Nevertheless, I do not believe respondent crossed the line. He lacks courtside manners, but his request of the jury to be careful in crafting their questions is not an actionable offense. The fact the jury foreman "was so upset that he considered deciding the case on grounds other than the evidence" is regrettable –jurors are sworn to render a verdict according to the evidence – but it does not support a finding of misconduct.

I will make no further effort to defend respondent's conduct. It is largely indefensible. The ultimate question – the question that really matters – is whether respondent's conduct, no matter the labels affixed to it, warrants removal from office. Regrettably, questions of penalty cannot be answered with scientific precision. There are no sentencing

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[83] The allegations against respondent are unlike another angry judicial outburst examined in *Kennick* where the judge verbally abused an attorney and later joked about the deed, suggesting the episode was instigated, in whole or part, for the judge's amusement.

[84] *Ryan, supra*, 45 Cal.3d 518, 545.

guidelines for us to follow, no mandatory sentencing laws or three strikes laws applicable to judges. But we are not without guidance. According to the Supreme Court, the sanction of removal is invoked when necessary for "the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system."[85] Our task is not to punish but "is to determine the nature of the discipline, if any, that is necessary to achieve these goals."[86]

Obviously, what is necessary to protect the public from boorish behavior is different from what may be necessary to protect the public from corrupt decision making based on friendship,[87] a persistent pattern of ex parte contacts and alteration of court records,[88] persistent failures to perform duties in a diligent fashion,[89] accepting gifts from litigants,[90] abuse of the contempt power,[91] prejudgment of cases, [92] or interfering with the conduct of a commission investigation.[93]

Certain conduct is so egregious that even a single instance warrants the severest of sanctions. For example, a judge who accepts a single bribe arguably poses too great a risk to the public and to public confidence in the integrity and independence of the judiciary to be permitted to continue in office. The same cannot be said of

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[85] *Adams, supra*, 10 Cal.4th 866, 912.
[86] *Kloepfer, supra*, 49 Cal.3d 826, 865.
[87] *Spruance, supra*, 13 Cal.3d 778; *Gonzalez, supra*, 33 Cal.3d 359.
[88] *Fletcher, supra*, 9 Cal.4th 865.
[89] *Kennick, supra*, 50 Cal.3d 297.
[90] *Adams, supra*, 10 Cal.4th 866.
[91] *Cannon, supra*, 14 Cal.3d 678; *Wenger, supra*, 29 Cal.3d 615.
[92] *McCullough, supra*, 49 Cal.3d 186.
[93] *Fletcher, supra*, 19 Cal.4th 865.

intemperance because intemperance can take so many forms and vary in degree. Perhaps that explains why there are no cases removing a judge from office based solely on demeanor violations.[94] This is not to suggest that there will never be a case warranting removal based on outrageous demeanor. This is simply not an appropriate one.

A review of the 14 removal cases published since 1960 confirms this assessment. Of those 14 cases, eight included allegations of intemperate conduct. In *Fletcher, supra*, 19 Cal.4th 865, the judge engaged in a pattern of ex parte contacts (six counts), prejudged evidence, altered court documents, entered judgment without notice to the parties, and used a photograph of staff for campaign purposes without their consent. The accusation also included a demeanor allegation (berating an attorney in open court: "She shouldn't be handling criminal cases"; "[She] probably had something more important to do today, like go to a PTA meeting"; "She has a whole bunch of kids. She's been having kids ever since I've known her.",[95] but it hardly mattered given the weight of the other misconduct.

Kennick, supra, 50 Cal.3d 297 is an interesting case where the judge was removed from office for failure to perform the duties of office. However, he was charged with a multitude of other violations. Among other things, he was found to have been rude and abusive to officers who arrested him for driving under the influence (DUI) and thereafter sought preferential treatment in the investigation

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[94] The majority decision appears to treat respondent's reference to his difficulty as a "demeanor problem" as an effort to minimize the seriousness of his conduct. My use of the term is not so intended; it is a convenient shorthand description of the various allegations at issue in this proceeding.

[95] *Fletcher, supra*, 19 Cal.4th at p. 880.

of the DUI charge. It was also alleged that he treated attorneys with disrespect. In addition to yelling at a prosecutor, detailed *ante*, the judge also argued with another deputy district attorney who objected to being addressed as "ma'am" and ordered her "not to come in here again," to which she responded, "Thank you very much. That's a privilege." Given the mutual nature of the combat, the Supreme Court disagreed with the determination of prejudicial conduct and ordered the charge dismissed. However, the court concluded the judge had committed prejudicial conduct in addressing female attorneys and others appearing before him as "sweetie," "sweetheart," "honey," or "dear" and in treating both criminal defendants and witnesses rudely and with disrespect – interrupting them, yelling at them, and speaking in demeaning tones. Multiple examples were given.[96]

Nevertheless, while the court found multiple instances of prejudicial conduct and one of willful misconduct based on demeanor and other allegations, in determining whether removal was appropriate, the court concluded: "All this judicial misbehavior by petitioner, though deplorable and clearly calling for censure, falls significantly short of the showings of willful misconduct and prejudicial conduct on which we have based orders removing judges."[97] In brief, the fact that the judge was "demeaning, rude, impatient, and abusive," "addressed women in the courthouse.. . with undue and demeaning familiarity" and "[t]wice, . . . yelled at and unjustly intimidated a deputy city attorney, and on

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[96] *Kennick, supra*, 50 Cal.3d at pp. 322-324.

[97] *Kennick, supra*, 50 Cal.3d at p. 339.

another occasion.. . imparted similar treatment to a deputy district attorney" did not warrant removal.[98]

Kloepfer, supra, 49 Cal.3d 826 is another case in which allegations of poor demeanor are part of a mix of findings that include four acts of willful misconduct and 21 acts of prejudicial conduct. In addition to a "persistent pattern of rude, abusive, and hostile behavior" that makes Judge Van Voorhis seem angelic, Judge Kloepfer persistently abused the contempt power, threatening and finding attorneys and parties in contempt with reckless abandon, and became embroiled in the cases to the point of refusing to dismiss prosecutions on the People's motion based on his personal perception of the defendants' guilt and raising bail in another case based on his view the defendant was "fraudulent, a liar, and deceitful."[99] There is no comparison between the scope and nature of the charges in *Kloepfer* and those involved here. The 18 charges of willful misconduct and two of prejudicial conduct in *Gonzalez, supra*, 33 Cal.3d 359 also do not resemble the charges in the present proceeding. Judge Gonzalez used his judicial office to intercede in criminal matters on behalf of friends, acted improperly in bail releases, impugned the character of his judicial colleagues, made ethnic and racial slurs, and generally conducted himself and his courtroom in a manner befitting a television comedian. Even more egregious than *Gonzalez* was the case of *Cannon, supra*, 14 Cal.3d 678, where the judge engaged in 21 acts of willful misconduct and eight acts of prejudicial conduct involving actions that the Supreme Court has described as "bizarre." In *Wenger,*

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[98] The court ultimately upheld the removal recommendation but based "on the sole ground of persistent failure or inability to perform his judicial duties." (*Id.* at pp. 342-343.)

[99] *Kloepfer, supra*, 49 Cal.3d at p. 861.

supra, 29 Cal.3d 615, the court sustained 10 charges of willful misconduct in nine separate incidents, including failure of the judge to disqualify himself, abuse of the contempt power, and retaliating against a prosecutor by banishing her from his courtroom because he suspected she had spoken with the commission regarding his judicial performance. *Spruance, supra*, 13 Cal.3d 778, like *Wenger*, is another case in which findings of intemperance are overshadowed by findings the judge attempted to influence the disposition of a case against a friend, acquitted a defendant who was the son of a friend and political supporter, reduced a traffic charge against the nephew of a friend and later, in another case involving the same defendant, ordered his own recognizance release to prevent him from being arrested on an outstanding warrant. The judge also solicited another judge to dismiss a traffic citation against him and altered the records to create the impression the dismissal was based on attendance at traffic school.

The one removal case that seems faintly comparable to the present one is *Geiler, supra*, 10 Cal.3d 270, in which a judge was removed for bringing the judicial office into disrepute. Judge Geiler, however, did not confine his misconduct to words. He invited a deputy public defender into chambers, produced a battery-powered dildo, and proceeded to thrust the object in the area of the attorney's buttocks. Later, during the attorney's cross-examination of a witness in open court, the judge suggested the dildo might be used to speed up the public defender's cross-examination, a suggestion that the Supreme Court concluded was made with the intent of curtailing cross-examination. Judge Geiler appeared obsessed with sex and public defenders. He used crude, vulgar, and profane

language in conversations with court personnel and female attorneys. As to the public defender, the court concluded he arbitrarily and capriciously removed the public defender from cases.

I cite previous removal cases with a full understanding of their limited utility. While some light is shed by precedence, each case we consider is singular and must be decided on the unique facts presented. Still, the fact respondent's conduct in this case is so much less egregious than the conduct in other cases in which demeanor served as the basis for removal should give us pause.

So also, a review of cases in which we have imposed censure is instructive. In *Roberts v. Commission on Judicial Performance* (1983) 33 Cal.3d 739 (*Roberts*), Judge Roberts was censured after he became visibly angry when told by an attorney that the attorney intended to petition the Court of Appeal for review of the judge's ruling, telling the attorney that he was "chicken to take the case to trial." He poked the attorney in the chest with his finger and told him, "Buddy boy, you're not going to get away with this," further stating, "I'm going to see that you lose this case big." When the attorney protested the threat, petitioner replied, "I'll threaten you anytime I feel like it." He later had ex parte conversations with the attorney on the other side and, after the Court of Appeal reversed his ruling, called the presiding justice and engaged in an angry diatribe. Further, the commission found that in a child neglect proceeding, Judge Roberts "improperly acted as an advocate, prejudged issues, abusively curtailed the presentation of evidence, and treated witnesses, litigants and an attorney in a rude, intimidating and demeaning manner." The Supreme Court did not review the evidence in detail but noted some examples: In response to an

objection by counsel, the judge replied, "I don't care whether you object to it or not.... I will hear no further objections of this kind, do you understand, Miss [M.]?" In response to a statement by a minor's mother, he admonished: "If you have anything to offer you are going to be sworn. You have no credibility with this court. When you are sworn, let alone volunteer statements, . . . I don't believe a word you have testified to in this courtroom." He demonstrated similar impatience towards another witness, interrupting testimony in mid-sentence and stating: "You may step down. I wouldn't believe you under oath, I don't want any more testimony like this. This witness doesn't know in one breath, and in the next breath it makes no difference. She would have [the mother], who had abused her own child, baby sit hers. Now, I don't have to listen to that kind of evidence."[100]

And that is not all. Judge Roberts also displayed impatience with a young, inexperienced counsel. During a recess, "he accused her of being incompetent to represent the defendant, and rudely quizzed her regarding her legal experience. As a result of petitioner's loud and angry manner, Miss A. began to cry and left the conference..."[101] Finally, Judge Roberts was convicted of violating section 148 of the Penal Code (resisting, delaying, or obstructing a public officer) based on his interference with uniformed California Highway Patrol officers who stopped a car being driven erratically by the judge's son.

Censure was also considered an appropriate sanction in *In re Stevens* (1982) 31 Cal.3d 403 (*Stevens*), which involved the conduct of a judge who remarked to counsel that black persons have to learn how to live in their own

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100 *Roberts, supra*, 33 Cal.3d 739 at pp. 743-745.
[101] *Roberts, supra*, 33 Cal.3d 739 at p. 745.

neighborhoods and that it was "typical" of black persons to fight unfairly. During his term in office, the judge frequently referred to black persons as "Jig, dark boy, colored boy, nigger, coon, Amos and Andy, and jungle bunny."[102] The commission recommended censure in *In re Gordon* (1996) 13 Cal.4th 472. There, the judge had repeatedly made sexually suggestive remarks to and asked sexually explicit questions of female staff members, referred to a staff member using crude and demeaning names and descriptions and an ethnic slur, referred to a fellow jurist's physical attributes in a demeaning manner, and mailed a sexually suggestive postcard to a staff member.

Dodds, supra, 12 Cal.4th 163 is another censure case worthy of mention. Judge Dodds was found to have failed to report a law violation by a colleague and to have suggested to his staff that they also refuse to cooperate. More relevant to the present case, it was also determined that Judge Dodds on several occasions engaged in rudeness and prejudgment in the handling of cases and on one occasion spoke insultingly of two lawyers who had appeared before him. His -rudeness included interrupting and yelling loudly and angrily at counsel and a litigant, as well as telling a joke that suggested bias. The Supreme Court concluded one of the offensive remarks was outside the statute of limitations and could not be considered and determined the remaining allegations did not support censure. Noting the judge had won praise from the bar and approval of the electorate, the court concluded public censure would not further the purpose of judicial discipline. The commission's recommendation thus was rejected. Declaring, "Cases in which we have publicly censured

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[102] *Stevens, supra*, 31 Cal.3d 403 at p. 44.

judges involve conduct more serious than that involved here,"[103] the court cited a long list of censure cases, some of which in my estimation involved conduct more serious than the conduct here under consideration. Thus, in *Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552, 556 the judge told a court reporter, "Your butt looks good in that dress"; and also said, "I certainly hope you're not that frigid at home with your husband." For good measure, the judge slapped or patted a court reporter and a court trainee on their buttocks.

Another factor in deciding an appropriate sanction is our assessment of the likelihood that the judge will reoffend. The majority decision indicates it is not merely likely; it is "close to a certainty." The near certainty is inspired by respondent's testimony before the masters and before the commission. The import of his testimony, according to the majority decision, is that respondent presents himself as well meaning but "misunderstood" and refuses to take responsibility for his actions or the problems created by them. The decision quotes liberally from colloquies between respondent and participants in these proceedings to make the point that respondent remains unremorseful; inasmuch as reform begins with repentance, Judge Van Voorhis is incapable of reform.

I would be persuaded by this logic had the evidence against the respondent been undisputed and the heinousness of his conduct conceded. Certainly, in all cases, respondents before the commission would be well advised of the value of contrition. However, a respondent is entitled to present a defense notwithstanding the unfavorable findings of the masters. Judge Van Voorhis appeared before the commission to dispute certain evidence and to

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[103] *Dodds, supra*, 12 Cal.4th 163 at p. 178.

explain his conduct. I do not regard his statement that he is often misunderstood as the ranting of a petulant adolescent attempting to evade responsibility for his actions. Respondent is simply acknowledging that he is hard and tough and crusty and becomes more so with age – but that beneath that exterior he attempts to be fair and compassionate. Despite his best efforts, he at times crosses the line. We have correctly rejected this plea as a defense. But it should not be viewed as a matter in aggravation. I do not begrudge respondent for his clumsy and ultimately unsuccessful effort to persuade us that he should be forgiven. He is simply explaining why conduct that comes naturally to some of us can be an effort for him.

I respect the opinions of my colleagues. Their assessment of respondent is probably correct in certain respects. Judge Van Voorhis will likely always be testy and somewhat ill-humored. Perhaps charm and geniality will not be his hallmark. But that is not an appropriate measure of his prospects for reform and future judicial temperance. Judicial temperance is not the ability to ingratiate but the ability to keep the pressures of the moment from overpowering judicial composure. The question is whether he can conform his conduct to what is expected of him by the Code of Judicial Ethics as construed and applied by this commission and by the Supreme Court. I am persuaded that he can. It would be nice if we had a greater array of sanction options – suspension, probation, compulsory education programs – to provide greater assurance.[104] I

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[104] Regrettably, we are without the authority conferred on judicial commissions in other states to impose discipline greater than reprimand or censure but less than removal. Suspension and training might be appropriate in this matter.

understand that my colleagues believe censure is too weak a sanction. I believe removal is too great.

Commission member Ms. Ramona Ripston expresses the following opinion.

Like Justice Raye, I believe that the removal of Judge Van Voorhis from his judicial office is too harsh an action. I, too, would find censure more than adequate for his misdeeds. Judge Van Voorhis's conduct does not, as Justice Raye so ably points out, represent the type of behavior for which the ultimate sanction is warranted. In short, I fully join in Justice Raye's separate statement dissenting from the commission's decision and order.

I write separately only to note that, while the precedent Justice Raye cites makes it clear that the discipline imposed on Judge Van Voorhis is excessive, we have come a long way from some of the attitudes reflected in several of the earlier cases and I would not want our examination of them to suggest an endorsement of each and every result. Times have changed and so have our standards. For example, I believe that the conduct that led the California Supreme Court to censure Judge Stevens a generation ago would today unquestionably demand his removal. In my view, in a number of areas including race and gender bias, we should hold our judiciary to a higher level of conduct than we did on some occasions in the past. (I hasten to add that Judge Van Voorhis was guilty of no such offense.) Still, all in all, our precedent retains a certain value and wisdom, and I would not abandon it as completely as my colleagues in the majority appear willing to do. More particularly, I would reserve the sanction of removal for jurists whose misconduct is more willful and egregious, and constitutes a more central affront to the judicial function.

CERTIFICATE OF SERVICE

I, Debbie A. Smith, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 88 Kearny Street, 10th Floor, San Francisco, California 94108-5530.

On May 23, 2003, I served the following document on the parties in the within action:

THE HONORABLE BRUCE VAN VOORHIS' PETITION FOR REVIEW OF DETERMINATION BY COMMISSION ON JUDICIAL PERFORMANCE [CRC RULE 935]

BY HAND: The above-described document will be placed in a sealed envelope which will be hand-delivered on this same date by SPINCYCLE LEGAL SERVICES, addressed as follows:

Jack Coyle
Commission on Judicial Performance
455 Golden Gate Avenue, Ste. 14400
San Francisco, CA 94102-3660

Richard Shickele
Commission on Judicial Performance
455 Golden Gate Avenue, Ste. 14400
San Francisco, CA 94102-3660

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on May 23, 2003.

By: /s/
Debbie A. Smith

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BRUCE VAN VOORHIS, JUDGE OF THE SUPERIOR COURT OF CONTRA COSTA COUNTY, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.	No. S116146 Commission on Judicial Performance Inquiry No. 165

ANSWER TO PETITION FOR REVIEW OF DETERMINATION BY COMMISSION ON JUDICIAL PERFORMANCE (RULE 935)

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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BRUCE VAN VOORHIS, JUDGE OF THE SUPERIOR COURT OF CONTRA COSTA COUNTY, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.	No. S116146 Commission on Judicial Performance Inquiry No. 165

ANSWER TO PETITION FOR REVIEW OF DETERMINATION BY COMMISSION ON JUDICIAL PERFORMANCE (RULE 935)

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INTRODUCTION

On February 27, 2003, the Commission on Judicial Performance voted 8-2 to remove Judge Bruce Van Voorhis for four acts of willful misconduct and seven acts of prejudicial misconduct. The commission largely adopted the findings and conclusions of the special masters, who unanimously concluded that the judge committed the same four acts of willful misconduct and seven acts of prejudicial misconduct. Historically, this court has given "special weight' to factual determinations in the report of the masters," who "have the advantage of observing the demeanor of the various witnesses," and "great weight' to the Commission's conclusions of law" in "recognition of the Commission's expertise." (*Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, 168.)

Judge Van Voorhis humiliated and berated attorneys, court staff and jurors in open court, acted with a lack of impartiality and the appearance thereof, abused his authority, appeared to make a ruling just to see how a young attorney would handle it, told a foreign-born attorney that he should "lose" his accent, and failed to cooperate with his presiding judge following a warning about his temper. The masters unanimously concluded that the judge has a "serious problem with judicial temperament and self-control," and that his conduct as a whole "depicts a very disturbing picture." (Special Masters' Findings of Fact and Conclusions of Law [docket #32],[1] filed September 6, 2002 [hereafter "masters' rpt."], p. 63.) The misconduct occurred after the judge had been publicly reproved for

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[1] The docket numbers appear on the attachment to the June 4, 2003, letter from Commission Counsel Richard Schickele transmitting the record to the court.

very similar conduct, and had received a separate private admonishment. All but two of the incidents occurred after a file-throwing incident which caused the presiding judge to meet with Judge Van Voorhis and warn him that his misconduct must not be repeated.

The masters found that the judge "allowed his impatience and seeming compulsion to display his judicial authority to embarrass, humiliate or simply humble those who cross him." The masters also found that the judge's misconduct toward lawyers took place "in front of jurors creating the risk of having cases decided on other than the merits." (Masters' rpt., p. 63.)

The commission agreed that the judge's misconduct had "interfered with the administration of justice in particular cases." The commission also found that the judge "does not appreciate the inappropriateness of his misconduct and that there is a strong likelihood that if he is allowed to remain on the bench he will commit future violations of the Code of Judicial Ethics." The commission concluded that it "cannot, consistent with its mandate to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the judiciary, allow Judge Van Voorhis to continue on the bench." (Decision and Order Removing Judge Van Voorhis From Office [docket #47] [hereafter "commission decision"], p. 52.)

In his Petition for Review (hereafter "petition"), Judge Van Voorhis seeks to set aside the commission's decision and asks this court to substitute its judgment for that of the commission, Even when the commission was limited to making disciplinary recommendations to this court, the court would give "special weight" to the commission's recommendation in recognition of its "expertise ... in

matters involving judicial conduct...." (*Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294 , 313.) Now that the commission has the independent authority to impose the sanction of removal, this court should give no less weight to the commission's decision as to discipline.

In response to the judge's claims, we contend that (1) the commission followed its rules in its vote to remove the judge; (2) the commission's findings and conclusions were supported by clear and convincing evidence; (3) the sanction of removal was justified by the facts and was clearly within the commission's discretion; (4) the judge's decision to contest the charges did not improperly impact the commission's decision to remove him; and (5) due process did not require that the judge receive a separate "dispositional hearing."

STANDARD OF REVIEW

Contrary to Judge Van Voorhis's argument (see petition, p. 3), the Supreme Court is not *required* to conduct an independent review of the record. The Constitution provides that the court "may, in its discretion, grant review" of the commission's determination, and that when it reviews the commission's determination, it "*may* make an independent review of the record," (Cal. Const., art. VI, § 18(d), emphasis added.)

The judge cites *Fitch v. Commission on Judicial Performance* (1995) 9 Cal.4th 552 on this issue, *Fitch* was decided in February 1995, prior to the effective date of Proposition 190. At the time, the court applied an independent standard of review "since the ultimate, dispositive decision to censure or remove a judge has been

entrusted to this court...." (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 276, cert. den. (1974) 417 U.S. 932.)

Beginning on March 1, 1995, the commission has had the authority to remove a judge (Cal. Const., art. VI, § 18(d)), and the commission's decision as to the ultimate discipline has been "of independent force and effect absent further action by this court" (*Geiler v. Commission, supra*, 10 Cal.3d at p. 276.) Since then, this court has not had occasion to articulate the standard it employs when considering whether to grant a petition to review a commission decision, or when rendering a decision on the merits after granting review.[2] However, in *Geiler*, this court stated that were the commission's recommendation

> of independent force and effect absent further action by this court, our review of the evidentiary basis for that recommendation might properly be limited to a determination whether the Commission's findings of fact were supported by substantial evidence, Under such a standard of review, we would not be free to disregard the Commission's findings merely because the circumstances involved might also be reasonably reconciled with contrary findings of fact, (Cf. *People v. Mosher* (1969) 1 Cal.3d 379, 395.)

(*Geiler v. Commission, supra*, 10 Cal.3d at p. 276.)

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[2] 2 In *Platt v. Commission on Judicial Performance* (Feb. 19, 2003, S111125), *Couwenberg v. Commission on Judicial Performance* (Jan. 16, 2002, S102066), and *Ross v. Commission on Judicial Performance* (Nov. 18, 1998, S071464), this court summarily denied the judges' petitions for review.

By citing *Mosher*, this court referenced the standard for reviewing the sufficiency of the evidence on an appeal from a criminal conviction. In such a situation, "this court must view the evidence in a light most favorable to [the prosecution] and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence," (People v. Mosher, supra, 1 Cal.3d at p. 395.)

PROCEDURAL HISTORY

The petition, at pages 4-5, correctly sets forth the procedural history.

ARGUMENT

I. THE COMMISSION LAWFULLY REMOVED JUDGE VAN VOORHIS.

Judge Van Voorhis argues that the commission violated the version of commission rule 134 that was in effect at the time of the special masters' hearing, but that was amended prior to the commission's decision removing Judge Van Voorhis (hereafter "former rule 134"). Under the judge's interpretation, former rule 134 required the commissioners who voted to impose discipline to be present at the evidentiary hearing before the special masters. Although the judge never raised this issue before the commission, he now contends that the order of removal thereby violated his due process rights.

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A. Former Rule 134 Was Never Intended to Require the Commissioners' Presence at the Evidentiary Hearing Before the Special Masters.

A brief history of commission rule 134 is in order, Prior to December 1, 1996, rule 134's predecessor, rule 917 of the California Rules of Court, provided:

> The affirmative vote of six members of the commission who have considered the record and report of the masters and who were present at any oral hearing as provided in rule 914 or, when the hearing was before the commission without masters, of six members of the commission who have considered the record, and at least three of whom were present when the evidence was produced, is required for a private admonishment or a recommendation of censure, removal or retirement of a judge or for dismissal of the proceedings.

Rule 914 provided that after the filing of the masters' report, the commission ordinarily "shall give the judge and the examiner an opportunity to be heard orally before the commission...."

Effective March 1, 1995, the California Constitution was amended to transfer the rule-making authority for commission proceedings from the Judicial Council to the commission. (Cal. Const., art, VI, § 18 (i).) Effective December 1, 1996, the commission adopted new rules (rules 101-13 8), which mostly tracked and renumbered former Rules of Court 901-922. However, the new commission rule 134 mistakenly referred to commission rule 121 (the successor to former Rule of Court 907) rather

than commission rule 132 (the successor to former Rule of Court 914). Rule 121 provides for the setting of the evidentiary hearing that takes place before the special masters or the entire commission, and makes no reference to the oral hearing that takes place before the commission pursuant to rule 132, following receipt of the masters' report.

Clearly, the reference to rule 121 in former rule 134 was inadvertent and in error, Former rule 134 retained rule 917's requirement that the commissioners be present at the "oral hearing," not the evidentiary hearing. The hearing before the masters is not referred to as the "oral hearing"; indeed, even the judge consistently refers to it as the "evidentiary hearing." (See petition, pp. 6-8.) The judge's interpretation would nonsensically require more commissioners (six) to be present if the evidentiary hearing takes place before special masters rather than before the commission (in which case only four need be present). Under the judge's interpretation, if six commissioners were not present at a masters' hearing, no discipline could be imposed. In addition, under the judge's reading, former rule 134 would not have required that any commissioner be present at the oral hearing at which the case is argued before the commission.

"Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies." (*California Drive-In Restaurant Association v. Clark* (1943) 22 Cal.2d 287, 292; *Head v. Civil Service Commission* (1996) 50 Cal.App.4th 240, 243.) Under rules of statutory construction, courts should construe statutes so as to avoid "absurd" results, if possible. (*Landrum v. Superior Court* (1981) 30 Cal.3d 1, 9.) As the

court stated in *Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, a rule is to be accorded

> a reasonable and commonsense interpretation consistent with its apparent purpose, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.

(*Id.* at p. 1321.)

The commission has never interpreted former rule 134 to require that its members be present at the evidentiary hearing. There is no evidence that any commissioner was present at any special masters' hearing that took place subsequent to December 1, 1996, and that resulted in discipline, including the three cases in which judges filed petitions for review in this court, *Platt v. Commission on Judicial Performance* (Feb. 19, 2003, S111125), *Couwenberg v. Commission on Judicial Performance* (Jan. 16, 2002, S102066), and Ross v. Commission on Judicial Performance (Nov. 18, 1998, S071464).[3] An administrative agency's interpretation of its own regulation deserves "great weight." (*Culligan Water Conditioning v. State Board of Equalization* (1976) 17 Cal.3d 86, 93.)

On October 18, 2002, the commission publicly circulated a biennial review of its rules, which included a proposal to change the reference in rule 134 from 121 to 132.[4] The report explained that the proposed

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[3] Pursuant to Evidence Code sections 452(d)(1) and 459(a), the commission has requested the court to take judicial notice of the court's records in these cases.

[4] Pursuant to Evidence Code sections 452(c) and 459(a), the commission has requested the court to take judicial notice of the

amendment clarifies that the affirmative vote of six members of the commission who were present at the hearing before the commission as provided in rule 132 are required for the imposition of discipline. The existing rule allows for some confusion between evidentiary hearings before the commission or masters (rule 121) and hearings before the commission when masters have issued a report (rule 132).

The amendment to rule 134 was adopted at the commission's January 29, 2003, meeting. According to the Report of the Commission on Judicial Performance Regarding Adoption of Modifications to Rules and a Policy Declaration at its January 29, 2003 Meeting:[5] "The purpose of the change was to correct a faulty reference to another rule and clarify that the affirmative vote of six members of the commission who are present at the hearing before the commission as provided in rule 132 are required for the imposition of discipline. The change was unopposed."

B. Rule 134, as Amended Prior to the Commission's Order of Removal, Clearly Permitted Judge Van Voorhis's Removal.

At the time of the commission's order of removal, commission rule 134 provided in part that the "affirmative vote of six members of the commission who have

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Biennial Review of the Rules of the Commission on Judicial Performance, dated October 18, 2002.

[5] Pursuant to Evidence Code sections 452(c) and 459(a), the commission has requested the court to take judicial notice of this document.

considered the record and report of the masters and who were present at any oral hearing as provided in rule 132" is required to impose discipline. As stated above, rule 132 provides for the oral hearing before the commission after it receives the masters' report and any objections.

The oral hearing took place before the commission on December 4, 2002. Ten commissioners were present. (Transcript of Oral Argument Before Commission on Judicial Performance [docket #43] [hereafter "transcript of oral hearing"], pp. 3, 4:7-8.) Eight of those commissioners voted to remove Judge Van Voorhis. (Commission decision, p. 52.) Since the commission's order of removal took place after rule 134 was amended, the commission complied with its own rules, Remanding the matter to the commission would serve no purpose, as the commissioners, under current rules, are clearly permitted to vote on discipline despite their absence from the special masters' hearing.

C. The Commissioners' Absence From the Evidentiary Hearing Was Not Fundamentally Unfair.

Judge Van Voorhis, citing *Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265 and *Layton v. Merit System Commission* (1976) 60 Cal.App.3d 58, argues that the commissioners' absence from the evidentiary hearing was "fundamentally unfair," (Petition, p. 6.) In *Vollstedt*, a city employee challenged a demotion that had been upheld by the city manager after the civil service commission had conducted a hearing and determined that the evidence was insufficient to support a finding that the demotion was proper. The city manager upheld the decision to demote based on information supplied by the city's personnel director, without reviewing the evidence presented at the

hearing and without the benefit of a written statement of facts prepared by the commission. (*Vollstedt v.Stockton, supra*, 220 Cal.App.3d at p. 268.) The court vacated the city manager's decision because it denied the employee due process and violated the principle that "he who decides must hear," (*Id.* at p. 269.)

Judge Van Voorhis concedes that the principle that "he who decides must hear" "does not require the decision maker to necessarily attend the evidentiary hearing" (petition, p. 7); it is enough that the decision maker reads the evidence presented at the hearing and hears the oral arguments or reads the briefs. (See *Vollstedt v. Stockton, supra*, 220 Cal.App.3d at p. 275.) The commissioners, before issuing their decision, received and reviewed the record, including the transcript of the evidentiary hearing, the special masters' report, and the judge's written objections to the report, and heard oral argument. (Transcript of oral hearing, p. 5:10-14.)

In *Layton*, a city librarian challenged a two-day suspension. The court interpreted the city code to require that, in the event of such a challenge, the employee is entitled to an evidentiary hearing at which the appointing authority or the city bears the burden of proof. (*Layton v. Merit, supra*, 60 Cal.App.3d at p. 66.) Judge Van Voorhis received an evidentiary hearing at which the examiner had the burden of proof. The judge received and exercised the opportunity to rebut evidence, cross-examine witnesses, produce evidence and call witnesses.

There is no evidence that the judge in any way relied on the presence or absence of commissioners at the masters' hearing. After the masters issued their report, the judge filed objections to their findings and conclusions and briefed the appropriate level of discipline. Accordingly, the

decision to remove Judge Van Voorhis satisfied due process. Where the judge otherwise receives due process, procedural defects in the commission's proceedings as a result of the commission's failure to follow its own rules do not violate due process. (*McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 519.)

The use of the amended rule 134 in Judge Van Voorhis's case was not an improper retroactive application of the rule. Retrospective or retroactive legislation violates due process if it deprives a person of a vested right or substantially impairs such right. (7 Witkin, Summary of Cal. Law (9th ed. 1996) Constitutional Law, § 486, p. 675.) There is no vested right in existing rules of procedure. (*Id.*, § 492, at p. 682.)

In *Florence Western Medical Clinic v. Bonta* (2000) 77 Cal.App.4th 493, the court rejected the argument that a statute that went into effect after administrative hearings in the case began could not be applied in the case, The court stated:

> A statute is applied retroactively only if it changes the legal consequences of an act *completed* before the effective date of the statute. A statute addressing procedures to be utilized in legal proceedings not yet concluded operates prospectively for acts to be performed after the effective date of the statute.

(*Id.* at p. 503, emphasis in original.) Since the amendment to rule 134 made no changes in the conduct of the evidentiary hearing, the fact that the evidentiary hearing took place and the masters' report issued before the change in the rule does not change the conclusion that the rule was not applied retroactively. (See *Landau v. Superior Court*

(1998) 81 Cal.App.4th 191, 215 [statute that was amended to relegate doctor to writ review of Medical Board's revocation of her license did not improperly apply retroactively, even though administrative hearing before ALJ and ALJ's ruling preceded effective date of statute, where amendment made no changes in conduct of hearing before ALJ].)

Applying rule 134 as amended also does not implicate any "ex post facto" prohibitions. Ex post facto prohibitions apply only to penal statutes, and are not applicable in disciplinary proceedings. (*Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 550; *Nicholson v. Judicial Retirement and Removal Commission* (Ky. 1978) 562 S.W. 2d 306, 308.)

D. Judge Van Voorhis Waived This Issue by Not Raising It Prior to the Commission's Order.

Judge Van Voorhis admits that he did not raise this issue at the hearing before the special masters, (Petition, p. 8.) In addition, the judge never raised this issue during the briefing before the commission. Indeed, the judge even argued that public admonishment was the appropriate sanction. (Bruce Van Voorhis's Opening Brief to the Commission re the Masters' Proposed Finding of Fact and Conclusions of Law [docket #35], filed September 23, 2002, [hereafter "judge's OBC"], p. 26.) At the oral hearing, the judge told the ten commissioners present that he was "ready to be punished" (transcript of oral hearing, p. 16:2) and that he "came to this room to ask that you impose the appropriate punishment" (*id.* at p. 22:5-6). By failing to object to the participation of commissioners who were not present at the evidentiary hearing, the judge waived this issue. (See *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 833, fn. 3 [judge's

claim that members of commission were biased was waived since judge made "no effort to disqualify those officers prior to or at the hearing"].)

II. THE COMMISSION'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

A. Count One

The commission adopted the masters' finding that during his posttrial comments to a prosecutor in *People v. Elze*, Judge Van Voorhis "gave the appearance of having decided a legal issue to teach a new lawyer how to handle adversity." (Commission decision, p. 3.) The judge's comments pertained to his suppression of pre-field sobriety test statements of a detained motorist. (*Id.* at pp. 2-3.) The masters and the commission concluded that the judge's comments constituted prejudicial misconduct. (*Id.* at p. 4; masters' rpt., p. 7.)

1. The Commission Properly Adopted the Masters' Findings.

Judge Van Voorhis argues that there was not clear and convincing evidence to support the charge. (Petition, p. 21.) In fact, all three percipient witnesses other than the judge testified that the judge made the statements in question. The prosecutor, Deputy District Attorney Stacey Brock, testified that the judge said: "I knew that you were entitled to [introduce] the statements, but I kept them out to see how you'd handle yourself." (R.T. 84:4-9.) Deputy District Attorney Danielle Douglas testified that the judge said that the excluded statements should have come in under the law, but that he wanted to see how Brock "would handle it" or

"adapt" without them. (R.T. 88:23-89:4, 89:18-20.) Deputy District Attorney Christopher Nimr testified that the judge said that he had intentionally excluded the evidence to see how Brock would react to it. (R.T. 614:3-6, 615:6-8.) During the hearing before the masters, even Judge Van Voorhis admitted that "on the face of it," Brock "should have expected a victory" and that he "knew that, in a case of detained motorist [sic], you're not entitled to Miranda warnings and any of the admissions that you make are admissible...." (R.T. 681:12-16.) The fact that the witnesses had slightly different recollections of some of the details of the conversation (see petition, p. 21) does not detract from their agreement as to the substance of the judge's remarks,

The testimony of the percipient witnesses was consistent with their prior statements, On February 14, 2001, Stacey Brock spoke to commission investigator Bruce Hinze about the judge's statements that had been made just two weeks previously. (R.T. 29:3-6, 489:1-7.) Her testimony was not impeached with any prior inconsistent statements. On May 8, 2001, Danielle Douglas told Hinze that the judge had told Brock that "you and I both know you were entitled to those statements under law," (R.T. 104:9-16, 490:1-8.) On May 9, 2001, Christopher Nimr told Hinze that the judge had stated to Brock words to the effect that he had excluded the evidence "to see what you would do." (R.T. 49 1:17-22, 612:25-613:8.)

The judge asserts that there were "extensive discussions" at the district attorney's office about his statements. (Petition, pp. 27-2 8.) This evidence supports, rather than undermines, the masters' finding that the judge made the shocking statements attributed to him, Had the

judge only made the innocuous statements that he claims to have made, it would have been of no interest in the district attorney's office.

Moreover, the conversations between the witnesses did not alter their recollections of the judge's statements. Although Stacey Brock talked with everyone in her office about what the judge had said (R.T. 82:2-6) and the discussions were extensive (R.T. 82:9-11), there was no doubt in her mind that the judge told her, "I knew that you were entitled to the statements, but I kept them out to see how you'd handle yourself." (R.T. 82:22-83:1, 84:4-9.)

Danielle Douglas testified that when she and Brock left the courtroom, neither of them told the other what she heard the judge say, but each told the other that she could not believe that the judge had "just said that." (R.T. 101:8-25.) While Christopher Nimr admitted having had a conversation with people at his office which could have affected his recollection of the incident (R.T. 619:18-23), neither Brock nor Douglas had told him their recollections of the events (R.T. 611:22-612:1).

2. The Judge's Explanation for his Comments is Unreasonable.

The judge testified that he was trying to explain to Brock that his ruling was a "textbook example" about how one should select one's "battlefields" to avoid an unexpected. result – to wit, the granting of the motion to suppress. (R.T. 680:16-681:18, 715:22-716:10.) This echoed a statement the judge made in his response to the commission's preliminary investigation letter: "As a result of the unexpected pretrial ruling that the statements of the defendant were involuntary, because she had chosen to fight it out pretrial, the statements of Karl Elze had become of no use to her for impeachment...." (Examiner's exh. 2, p. 569.)[6]

Contrary to his contention, Judge Van Voorhis's ruling did not make the defendant's statements of "no use" to Brock for impeachment. As the judge stated during the suppression hearing, his ruling did not prevent Brock from using the defendant's statements for impeachment. (Examiner's exh. 3, pp. 13:20-23, 15:25-26; see *Harris v. New York* (1971) 401 U.S. 222, 226 [defendant's voluntary statement taken in violation of Miranda may be used at trial for impeachment purposes if defendant testifies to the contrary].) Since Brock had lost nothing by seeking to admit the defendant's statements in her case in chief, rather than saving them for impeachment, the judge's ruling was not at all a lesson in selecting one's battlefields to avoid an unexpected result, Judge Van Voorhis argues that his

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[6] The format of Judge Van Voorhis's response to the preliminary investigation letter reflects the judge's edit of the allegations to make them more accurately interpret the evidence as he "thought [he] knew it." (R.T. 736:1-6.)

explanation for his remarks is "the most reasonable" because there was "undisputed" evidence that (1) Brock overreacted to Judge Van Voorhis's ruling and (2) Judge Van Voorhis had a "good-faith belief' that the evidence was properly excluded, (Petition, pp. 27-28.) On the first point, the judge cites the testimony of defense attorney Timothy Gomes to the effect that Brock "continued to press the issue of the admissibility of the statements after the Court had ruled, that the ruling upset her, and that she did not behave appropriately." (Petition, p. 28.)

Gomes's testimony was not supported by the transcript of the suppression hearing. According to the transcript, Brock had to press the judge *to make a ruling*. Instead of making a ruling, the judge attempted to persuade Brock not to offer the defendant's statements in her case in chief. (Examiner's exh. 3, at 7:27-12:22.) When Brock said that she wanted to introduce admissions in her case in chief, the judge, without making a ruling, told her that she was "going to need to defend these because you've got a problem." (*Id.* at p. 12:23-26,) After a further statement by the judge in which he still refrained from making a ruling, the judge asked Brock: "So are we through?" (*Id.* at pp. 12:26-13:15.) The judge did not make a ruling excluding the evidence until Brock asked for a ruling. (*Id.* at p. 13:17-23.) In no way does the transcript reflect that Brock acted inappropriately, much less "unprofessionally," as the judge now suggests. (Petition, p. 28.)

On the second point, whether or not the judge acted in good faith when he suppressed the evidence is not determinative of whether the judge gave the opposite impression during his post-trial remarks, Moreover, the fact that case law appears to support a position contrary to the

judge's ruling[7] undermines the judge's assertion that he was acting in good faith, The clear implication of the judge's remarks was that the result was "unexpected" because he chose not to follow the law.

B. Count Two (A.1)

The commission adopted the masters' findings and conclusions that Judge Van Voorhis committed prejudicial misconduct when he "interjected a lengthy series of questions and comments about [defense attorney William] Gardner's cross-examination that disparaged his professional competence." (Commission decision, p. 5, quoting masters' rpt., pp. 10-11.) The judge's statements included, "That's not the way to prove a case in criminal court. Didn't you learn that in law school?"; "You learned what hearsay was in law school"; and "Now you need to ask him the question that you learned in law school is a legitimate question." (Examiner's exh. 4, pp. 64:24-25, 65:24-25, 66:12-14.) The judge "raised his voice and his tone was condescending, disrespectful and contemptuous."

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[7] See *Berkemer v. McCarty* (1984) 468 U.S. 420, 440 ["persons temporarily detained pursuant to [ordinary traffic] stops are not 'in custody' for the purposes of Miranda" and therefore do not have to be advised that their statements could be used against them]; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1753-1754 [no *Miranda* warnings required where defendant was asked to step out of his vehicle and accompany officer to customs security office, where he was subjected to pat down search, directed to sit on a bench, and detained for more than one hour waiting for CHP officer's arrival]; *People v. Lopez* (1985) 163 Cal.App.3d 602, 603609 [no *Miranda* warnings required where speeding station wagon almost struck patrol car, officers pursued station wagon with lights and siren on for over 1 Y2 miles, officers detained driver and passengers for less than 15 minutes, and one officer questioned defendant about tools in vehicle that turned out to be stolen].)

(Commission decision, p. 5.) Due to the judge's rejections of the prosecutor's requests that the discussion take place at the bench, the exchange took place in front of the jury "with the risk of having the jury decide the case based on nonevidentiary reasons," (Commission decision, pp. 5-6.)

Judge Van Voorhis does not assert that he did not commit prejudicial misconduct; he simply claims that the commission omitted several "undisputed facts" in reaching its conclusion. First, the judge claims that Gardner provoked him by attempting to place in front of the jury evidence that Gardner knew was inadmissible, (Petition, p. 30.) The judge, however, testified that he did not know whether Gardner was intentionally doing something to obtain an improper advantage. When asked by a master whether Gardner was "negligent, unprepared, or intentionally smart and intentionally doing something to gain an improper advantage," the judge responded: "I know I couldn't answer that question because I would have to be able to see in his mind to know that. And both possibilities remained in my mind." (R.T. 727:24-728:6.) While the prosecutor believed that Gardner was improperly attempting to introduce inadmissible evidence in support of the defense (R.T. 253:3-9, 254:12-15), Gardner testified that he believed the evidence was admissible (R.T. 454:6-11).

More significantly, most of Gardner's attempts to introduce the evidence were in response to the judge's questioning. (R.T. 254:3-4.) The fact that the judge, by refusing or ignoring the prosecutor's requests to conduct the discussion outside the presence of the jury (R.T. 58:22-24, 64:22-23), permitted Gardner to make statements concerning the evidence in the presence of the jury is an *aggravating*, rather than a mitigating, factor, Even the

judge admitted that his approach enabled Gardner to place inadmissible evidence in front of the jury, and that "a skillful judge would have called a recess," (Examiner's exh. 2, p. 542, quoted in masters' rpt., p. 11.)

The judge also claims that the commission's decision omitted Gardner's perspective of the exchange. (Petition, p. 30.) In fact, Gardner's testimony does not detract from the commission's findings. Gardner testified that the judge raised his voice (R.T. 450:18-19), that his tone was condescending, disrespectful and contemptuous (R.T. 453:23-454:4), and that the judge's treatment of Gardner was "uncalled for" (R.T. 453:10). Gardner was worried that the judge's criticism of him in front of the jury had adversely influenced the jury and harmed his case. (R.T. 454:21-25.) When the jurors came back with a note about Gardner's competence, Gardner believed that they got the idea from the judge's criticism of him. (R.T. 455:1-7.)

Finally, contrary to the judge's petition, at page 30, the judge's belated and equivocal expression of regret (R.T. 555:4-11) is not a mitigating factor, "[T]he difficulty with [the judge's] professed enlightenment is its delayed arrival.' [Citation.] 'Mitigation of wrongdoing requires more than an unfulfilled intent to reform," (*Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 921, quoting *Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 654.)

The judge did not regret his remarks anywhere near the time he made them in June 1999. There is no evidence that he ever apologized to Gardner. Subsequently, the judge made similar comments to attorneys in *People v. McDonald* (examiner's exh. 6, p. 104:12-14), *People v. Sowande* (respondent's exh. 19, pp. 97:22-24, 98:2-3, 9-11), and *People v. Elze* (respondent's exh. 16, p. 408:20-

22).[8] The fact that Judge Van Voorhis continued to disparage attorneys' professional competence with references to their law school educations suggests that the judge's regret is at best belated.

C. Count Two (A.2)

The commission and the masters concluded that in *People v. Gotchall*, Judge Van Voorhis committed willful misconduct during an extended colloquy with Deputy District Attorney Kathleen McMurray in front of the jury. (Commission's decision, p. 13; masters' rpt., p. 20.) The judge's comments took place after McMurray tried to introduce the results of a horizontal gaze nystagmus (hereafter "HGN") test during Officer Carleen Kerns's testimony. (Commission's decision, pp. 6-9.) Among other things, the judge questioned McMurray's motives, falsely accused her of starting something she had "no intention of completing" and of trying to leave the jury with "half-truths," and ridiculed the evidence she was attempting to introduce, (*Id.* at pp. 7, 12-13.) The judge's tone was condescending, hostile, and sarcastic. (*Id.* at pp. 7-9.)

Judge Van Voorhis admitted that he criticized McMurray's performance as an attorney, and that when he queries an attorney in front of the jury – as he did here – it has the potential of diminishing the attorney's credibility in the eyes of the jury. (R.T. 574:10-2 1.) However, he claims that the purpose of his admonishment was to protect the defendant, not to disparage the prosecutor. (Petition, p. 32.)

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[8] Since Judge Van Voorhis was the respondent during the hearing before the masters, each of his exhibits will be cited as "respondent's exh."

The masters did not believe the judge's rationale for his comments, and found that the judge's statements "could not have been meant for any purpose other than to deliberately ridicule Ms. McMurray and prejudice her case in front of the jury." (Masters' rpt., p. 22, quoted in commission decision, p. 12.) The masters reached their conclusion because the judge's comments were "unnecessary to the conduct of the trial and risked prejudicing the jury against the prosecutor[,]" the judge's "antagonistic" tone suggested that he had become "embroiled" in the conflict with the prosecutor, and the judge "abandoned his role of neutrality by interjecting his views and opinions about the gaze nystagmus test." (Masters' rpt., pp. 20-21.)

The commission adopted the masters' findings, and added that even if the judge's explanation were credited, it would not justify the judge's "deprecation of the prosecutor's motives, his ridiculing of her perception or his prejudicing of her case before the jury." (Commission decision, p. 12.) The commission concluded that the judge "lost his temper and made comments for the corrupt purpose of venting his anger or frustration." (*Ibid.*)

Judge Van Voorhis argues that (1) he did not act in bad faith, but "reasonably concluded that the particular officer testifying did not have sufficient training and experience to qualify the officer as an expert on why or how the gaze nystagmus test was an indicator of alcohol intoxication" (petition, pp. 3 1-34); (2) the prosecutor "later admitted her mistake on the record" (*id.* at p. 32); and (3) the defense attorney (David Larkin) testified that McMunay was "very argumentative" with the judge, and that the judge's admonishment of her was appropriate (*id.* at pp. 34-3 5). These contentions lack merit.

1. The Judge Acted in Bad Faith.

A judge acts in bad faith by

> (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority.

(*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1092.) Judge Van Voorhis acted in bad faith by making his remarks for a "purpose other than the faithful discharge of judicial duties."

In *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, the Supreme Court adopted the commission's conclusion that a judge who "engaged in curt and rude conduct by deliberately ridiculing members of the bar" committed "wilful misconduct in office," (*Id.* at p. 703.) Judge Cannon's conduct included two matters in which she accused attorneys of lying. In one matter, a deputy public defender (Vernon Putnam) moved to exclude a police officer from a preliminary hearing on the ground that he might wish to call the officer as a witness. (*Id.* at p. 688, fn, 9.) The judge responded:

> You know you're not going to call him. Please don't lie to me. [¶] ... Please don't make these phony motions, and don't lie to me in open court.... [¶] ... I am tired of these obstructionist tactics. You have no intention whatsoever of calling that person.

(*Ibid.*) The judge then held the attorney in contempt of court and ordered that he be taken into custody. (*Id.* at pp. 688-689, fn. 9.)

In another matter, a deputy public defender (Allen Fleishman), who had just been appointed to represent a defendant, requested a brief continuance and asked to explain why. Judge Cannon responded, "[L]et's not have lying in open court like somebody in your office does." (*Id.* at p. 691, fn. 11.)

Judge Van Voorhis attempts to distinguish *Cannon* on the ground that Judge Cannon "conceded that she deliberately and intentionally ridiculed a public defender," (Petition, p. 32.) However, the public defender whom the judge admitted she deliberately ridiculed was a different attorney (Klein), and her admission pertained to a different allegation. (*Cannon v. Commission, supra*, 14 Cal.3d at p. 703.) The court found that the judge deliberately ridiculed the other attorneys absent an admission by the judge,

Judge Van Voorhis also argues that there were multiple abuses of the judge's contempt power in *Cannon*. (Petition, p. 32.) While Judge Cannon did abuse her contempt power in her treatment of Deputy Public Defender Putnam, that was not the case with Deputy Public Defender Fleishman. (See *Cannon v. Commission, supra*, 14 Cal.3d at p. 691, fn. 11, ¶ 4.) Moreover, the court's finding that the judge engaged in willful misconduct by ridiculing members of the bar, which was charged in allegation F in that case (*id.* at p. 703), was separate from its finding that the judge misused her contempt power, which was charged in allegation A (*id.* at pp. 693-695).

This court also found abusive treatment of counsel to constitute willful misconduct in *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297. In *Kennick*,

the judge curtailed the prosecutor's examination of the victim during a preliminary hearing. After holding the defendant to answer, the judge ordered the prosecutor into his chambers, where he "angrily accused her of creating a security hazard" by her continued examination of the victim in the presence of persons in the courtroom connected with the defendant, The judge yelled so loudly that a clerk could hear his voice in the courtroom. The prosecutor emerged from the judge's chambers in tears and never returned to the judge's courtroom for any further preliminary hearings. (*Id.* at p. 323.) The judge was later heard saying "how funny it was that he had upset a deputy district attorney and made her run out of his courtroom." The court found that the judge's behavior toward the prosecutor in chambers was demeaning, rude, impatient and abusive, and constituted willful misconduct. (*Id.* at p. 324.)

Judge Van Voorhis argues, without citation to the record, that it was his "good-faith belief that, under California law, the inquiry [into the admissibility of the sobriety test evidence] did not have to be conducted outside of the presence of the jury." (Petition, p. 33.) However, the issue was not whether the inquiry should have taken place in front of the jury, but whether the judge should have made disparaging statements about the prosecutor in front of the jury.

The judge then argues that he correctly excluded evidence of the HGN test (Petition, p. 33.) Although the propriety of the judge's ruling was not a basis for the commission's finding of misconduct, the judge's position is incorrect The gaze nystagmus evidence "'was admissible without further foundation as claimed by Ms. McMurray,'" and "'[n]o contrary authority was cited by the court'"

(Commission decision, p. 9, quoting masters' rpt, p. 14, fn. 5, citing *People v. Joehnk* (1995) 35 Cal.App.4th 1488, 1507-1508.)

The judge now appears to argue that his ruling was based on the lack of a "showing that the testifying officer was a properly trained officer." (Petition, p. 34, emphasis added.) However, during Officer Kerns's testimony, the judge insisted that under the case law, McMurray needed to produce an "expert" to testify that the gaze nystagmus test had some scientific basis. (Examiner's exh. 5, pp. 81:6-7, 83:11-14, 84:9-10.) After Officer Kerns completed her testimony, the judge continued to insist that "the appellate decision flat out says that in the absence of expert testimony, gaze nystagmus is without any scientific support...." (*Id.* at p. 98:3-6.) In his response to the commission's preliminary investigation letter, the judge continued to maintain that his concern was the prosecutor's failure to "**subpoena[ ] any expert to present necessary foundation** testimony as to the scientific validity of the test" (Examiner's exh. 2, p. 539, emphasis in original.) The judge's claim that "there was no showing that the testifying officer was a properly trained officer" also omits the facts that when the prosecutor inquired about Officer Kerns's training in the administration of the gaze nystagmus test (examiner's exh. 5, p. 80:16-17), the judge insisted that she produce an expert (*id.* at p. 81:6-7), and threatened to "take the jury away from" her if she continued going "down that road" without producing an expert(*id.* at pp. 85:28-86:1).

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2. The Judge Misstates the Record When He Asserts that the Prosecutor Admitted She Was Wrong.

The judge's claim that McMurray "admitted her mistake on the record" (petition, p. 32) completely misstates the record. After the judge told her that part of her argument in front of the jury was "nearly contempt of court" (examiner's exh. 5, pp. 97:25-98:1), McMurray simply stated that she did not mean any disrespect to the court, that she "didn't know" (that she needed an expert), that she had introduced gaze nystagmus testimony without an expert in the past, that she was not "embarking down a road that [she] clearly knew [she] couldn't go down," and that she was unaware that the officer would not be able to qualify as a witness. (Examiner's exh. 5, p. 98:12-25.)

Contrary to the petition, at page 34, McMurray's belief that the officer was qualified to testify about the HGN test was based not only on her interview with Officer Kerns, but on her own training and success in introducing the test in a prior case. (R.T. 109:19-1 10:4, 125:18-25.) In addition, as stated above, case law supported her position.

3. The Masters and the Commission Properly Rejected David Larkin's Testimony.

Judge Van Voorhis also argues that defense attorney David Larkin did not think that the judge was harsh, sarcastic, or discourteous, and that McMurray was very argumentative with the court. (Petition, p. 34.) The masters "independently reviewed the transcript and did not accept Mr. Larkin's version of the events." (Masters' rpt., p. 19.)

The commission adopted this finding. (Commission decision, pp. 9-10.)

McMurray's arguments were in response to the judge's 15 questions directed to her. (Examiner's exh. 5, pp. 80:4-86:22.) "Clearly, the judge prolonged the argument by asking more questions that were leading nowhere." (Masters' rpt., p. 19.) When McMurray asked to address the matter outside the presence of the jury, the judge insisted that the colloquy take place in front of the jury. (Examiner's exh. 5, p. 83:2-7.)

D. Count Two (A.3)

The commission adopted the masters' finding that Judge Van Voorhis told Deputy Public Defender Esteban Alvear that he should "lose" his accent, (Commission decision, pp. 13-14; masters' rpt., p. 23.) Alvear was born in Ecuador and had lived in San Francisco for ten years. The judge's comment was unsolicited and was made from the bench in front of the lawyer's client who had just been convicted in *People v. Hoye*. (Commission decision, p. 13.)

The commission found that the judge's comment violated canons 1 (failing to observe "high standards of conduct"), 2A (failing to act in "manner that promotes public confidence in the integrity and impartiality of the judiciary"), 3B(4) (failing to be "patient, dignified, and courteous") and 3B(5) (manifesting bias or prejudice based on race or national origin). The statement constituted prejudicial misconduct because "it would have appeared to an 'objective observer' familiar with the facts and the standards of conduct that the judge's comment was prejudicial to the public esteem for the judicial office," (Commission decision, at p. 14.)

Judge Van Voorhis argues that his comment did not manifest bias or prejudice against Alvear (petition, p. 37) and did not constitute prejudicial misconduct (petition, p. 40). The judge does not challenge the conclusion that the comment was misconduct under other canons. (See petition, p. 38 ["A reversal of this [bias] finding does not disturb the finding establishing that the criticism was discourteous and undermining of the client's and the public's confidence in the attorney and subject to discipline."].)

To explain his statement to Alvear, the judge argues that a word in a question asked by Alvear during the trial "was briefly mistaken by at least two people as offensive slang." (Petition, p. 37.) In fact, the only evidence of this was the judge's own testimony about a question Alvear asked a police officer. (R.T. 433:25-434:23.) The prosecutor, Christine Meade, testified that she did not recall any point during the trial where it appeared to her that the police officer was having trouble understanding Alvear. (RT. 35:10-18.)

The judge also claims that at least one juror had difficulty with Alvear's accent. (Petition, p. 37.) However, the juror was not called to testify, and the juror's hearsay statement was admitted over objection only after the judge's counsel stated: "It's not being offered for the truth of the matter." (R.T. 350:24-25.)

Christine Meade, who had not known Alvear before the *Hoye* trial, testified that she had not found him difficult to understand, (R.T. 323:3-8.) No one had ever complained to Alvear's supervisor, Susan Hutcher, that Alvear was hard to understand, (Examiner's exh. 18, p. 11:1-4.) In addition, the masters did not find Alvear difficult to understand (masters' rpt., p. 23), and his accent had not changed since

the *Hoye* trial (R.T. 366:821). Although the court reporter in the *Hoye* trial at one point did ask Meade to speak up, and at another point asked a witness to repeat an answer (respondent's exh. 17, pp. 24:18, 148:16), a review of the Hoye transcript reveals no instance in which the court reporter or any witness asked Alvear to repeat anything. (See respondent's exh. 17.) The masters did not credit the judge's testimony (masters' rpt., p. 25), and the court should give "special weight" to the masters' finding. (*Dodds v. Commission, supra*, 12 Cal.4th at p. 168.)

Judge Van Voorhis also argues that the commission found only that there was a "possibility of bias," not the "appearance of bias," (Petition, p. 39.) In fact, the commission concluded that the judge's comment "gave the appearance of bias or prejudice based on race or national origin in violation of canon 3B(5)." (Commission decision, p. 14.) In *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, the court found it to be willful misconduct for a judge to make ethnic slurs that "are apt to offend minority members not familiar with [the judge's] views and may be construed by the public at large as highly demeaning to minorities." (*Id.* at p. 376, emphasis added.) Contrary to the judge's petition, at page 37, the masters never conceded that the judge's remarks were "not necessarily indicative of bias related to Mr. Alvear's ethnicity." Indeed, as in *Gonzalez*, whether the judge was in fact biased against Alvear was not at issue. (See *id.* [judge's "subjective intent is not at issue"].)

Finally, the judge argues that Alvear's subjective feelings are irrelevant. This argument lacks merit. At a minimum, the reaction of Alvear, like the reactions of other victims of the judge's misconduct, is a measure of the severity of the judge's misconduct and is therefore relevant

to the level of discipline that should be imposed.[9] In its discipline cases, this court has regularly alluded to the victims' reactions to judicial mistreatment. (See, e.g., *Kennick v. Commission, supra*, 50 Cal.3d at pp. 323, 326 [sustaining findings of misconduct of judge toward one prosecutor who "was extremely upset" by judge's accusation, and toward another prosecutor whom judge frightened and reduced to tears, so intimidating her that she felt she could never make another bail motion before the judge]; *Kloepfer v. Commission, supra*, 49 Cal.3d at pp. 840-843, 846 [sustaining findings that judge reduced one court reporter to tears, that another court reporter "became upset, nervous, and- scared" at judge's outburst, and that judge reprimanded prosecution witness who later said that "he never wanted to come to court again, or to be embarrassed and humiliated that way again"]; *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 544 [court noted that two female attorneys were "offended" by jokes judge told in his chambers]; *Roberts v. Commission on Judicial Performance* (1983) 33 Cal.3d 739 [as a result of judge's "loud and angry manner, Miss A, began to cry"]; *McCartney v. Commission, supra*, 12 Cal.3d at p. 529 [judge discharged court clerk "in such a violent manner as to leave her crying at her desk in the courtroom"].)

At the same time, the commission did "focus on an objective appraisal of [the judge] 's conduct in terms of the effect of such conduct on the administration of justice," and

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[9] Obviously, if there were evidence that the judge's victim was "thinskinned" (see petition, pp. 39-40), that evidence should be taken into account in determining what weight should be given to the victim's reaction. In this case, there was no evidence that Alvear was thin-skinned.

properly did not consider the judge's "subjective motivations" or the "subjective appraisal of his motivations by the persons directly affected by the specified conduct." (*Geiler v. Commission, supra*, 10 Cal.3d at p. 277.)

E. Count Two (A.4)

The masters and the commission found that Judge Van Voorhis committed willful misconduct when, in *People v. McDonald*, he engaged in a "lengthy, antagonistic critique of Ms. Meade's performance and ethics, in front of the jury, the defendant and opposing counsel," (Commission decision, p. 18, quoting masters' rpt., p. 32.) The masters found that the judge acted in bad faith because the evidence supported the conclusion that the judge's "corrupt purpose was to embarrass Ms. Meade in front of the jury." (Masters' rpt., p. 34.) The commission agreed that the judge's attacks on Meade were not made in the "faithful discharge of judicial duties[,]" and stated that he made the comments "in bad faith for the corrupt purpose of venting his anger or frustration." (Commission decision, p. 18.)

Judge Van Voorhis admits that he "failed to be patient, dignified, and courteous" to Meade, and that the "weight of the evidence" supports the conclusion that his failure to excuse the jury "was an oversight as a result of becoming embroiled." (Petition, p. 42.) The judge contends, however, that his conduct was "at worst prejudicial misconduct." (Petition, p.41.)

The judge's misconduct took place during a jury trial after Meade attempted to introduce evidence of the defendant's prior theft conviction. Previously, during an in limine hearing, Meade showed defense counsel a certified copy of the conviction packet, which included the terms and conditions of probation. (R.T. 326:12-28, 362:23-25.)

The defense attorney told the judge that his client previously entered a plea of no contest to a charge of theft and was placed on probation. (Examiner's exh. 6, pp. 4:26-5:4.) The judge asked Meade whether she "plann[ed] on offering evidence of that," and she replied, "yes." (*Id.* at p. 5:10-12.) Meade told the judge that when the defendant took the stand, she would ask him if he had been convicted of a theft offense, (*Id.* at p. 7:9-10.)

The judge denied the defense in limine motion to exclude the defendant's prior conviction. (*Id.* at p. 8:5-13.) The ruling, however, did not address the issue of the defendant's probationary status, and did not prohibit Meade from inquiring into it if the defendant did not admit the prior conviction.

When Meade questioned the defendant about the prior conviction during cross-examination, the defendant initially denied knowledge of whether he had been convicted. (Examiner's exh. 6, p. 103:15-20.) In order to refresh his recollection, Meade then asked the defendant about his probationary status, (R.T. 328:6-12; examiner's exh. 6, p. 103:21-24.) After the defendant asked Meade to rephrase the question, Meade again asked the defendant if he had been convicted of embezzlement and, after he admitted it, whether he was on probation for that conviction. (R.T. 328:14-24; examiner's exh. 6, p. 103:25-104:4.)

The judge argues that (1) Meade improperly inquired into the defendant's probationary status in violation of the judge's in limine ruling; (2) the defense attorney believed that Meade thereby committed prosecutorial misconduct; (3) the judge was not trying to embarrass Meade but was trying to "protect the fairness of the process"; and (4) a "spontaneous venting of anger or frustration cannot be bad-faith." (Petition, pp. 40-43.) These contentions lack merit.

First, as noted, the judge's in limine ruling did not restrict Meade from inquiring into the defendant's probationary status. Second, although the defense attorney argued during jury deliberations that Meade had committed prosecutorial misconduct when she inquired into the defendant's probationary status (examiner's exh. 6, pp. 13 1:22-133:23), he made no objection at the time of Meade's question (*id.* at pp. 103:21-104:4).

Third, the masters did not believe the judge and found that his purpose was to embarrass Meade in front of the jury, not to protect the fairness of the process. The evidence supports this. Although the judge has discretion to exclude evidence and a duty to protect fairness, that duty is not served by humiliating a prosecutor in front of the jury, attacking her legal training and professional competence, questioning her motives, and falsely accusing her of breaking the law, The masters found:

> The phrase "break the law" carries the connotation of a criminal act and would be interpreted by the jurors as such, The judge admitted that a ' skilled judge just doesn't make those accusations in the presence of the jury...."

(Commission decision, p. 17, quoting masters' rpt., p. 31.) The commission adopted the masters' findings (commission decision, p. 18), and those findings are entitled to great weight.

Finally, the fact that the judge's venting of anger or frustration may have been spontaneous does not negate a finding of bad faith, As stated above, a judge acts in bad faith by "performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of

judicial duties)...." (*Broadman v. Commission, supra*, 18 Cal.4th at p. 1092.) The masters found that the judge's purpose was to embarrass Meade in front of the jury.

F. Count Two (A.5)

The masters and the commission found that Judge Van Voorhis committed willful misconduct in *People v. Elze* when he directed Deputy District Attorney Brock to tell the jury that evidence she was seeking to admit the defendant's failure to follow directions during a horizontal gaze nystagmus test – "does not mean anything." (Commission decision, pp. 19-20; masters' rpt., pp. 35, 38.) The masters found that the judge "admitted that he knew of no authority in California that permitted him to order a lawyer to confess her mistakes to the jury (R.T. 664:10-15), and must have known there was none," (Masters' rpt., pp. 38-39.) The commission concluded that the judge "lost his temper and made comments before the jury in bad faith for the corrupt purpose of venting his anger or frustration," (Commission decision, p. 21.)

The finding of bad faith was proper. As the court stated in *Broadman*,

> a judge who transgress[es] the limits of a judge's lawful authority ... with no regard at all for whether [the judge's actions] are legally permitted cannot be said to be acting with a purpose to faithfully discharge judicial duties, Thus, a judge's reckless or utter indifference to whether judicial acts being performed exceed the bounds of the judge's prescribed power is a state of mind properly characterized as bad faith,

(*Broadman v. Commission, supra*, 18 Cal.4th at p. 1092,)

Judge Van Voorhis argues that he did not act in bad faith in that his purpose was to "cure the unfair inference created by the prosecutor." (Petition, p. 44.) In fact, the prosecutor had created no unfair inference at all, She simply elicited from Officer Lamberto Montano the facts that he performed an HGN test on the defendant after explaining it to the defendant, who appeared to understand. (Examiner's exh. 3, p. 57:16-23.) The officer never described the HGN test or stated the results of it. Even if the jury believed that the test could determine sobriety, no inference was left that the defendant passed or failed the test. The masters found that the judge's explanation that he "was protecting the defendant's rights against the prosecutor's attempt to introduce inadmissible evidence [was] unconvincing" (masters' rpt., p. 37), and the commission properly adopted this finding. (Commission decision, p. 20,)

Even when a prosecutor does create an erroneous impression, the judge may not correct it by directing her to tell the jury that evidence she is seeking to admit "does not mean anything." The judge has a "traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice[,]" (*People v. Hall* (1986) 41 Cal.3d 826, 834), may refuse to allow improper questions to be answered, even in the absence of an objection (*People v. Clark* (1992) 3 Cal.4th 41, 144, cert. den. (1993) 507 U.S. 993), and may give appropriate instructions and admonishments to the jury. However, the judge's power to "enforce order in the proceedings before it" (Code Civ. Proc. § 128(a)(2)) and to "control in furtherance of justice, the conduct of its ministerial officers" (*id.* § 128(a)(5)) does not permit him to humiliate lawyers who appear before

him. "There is never an instance which justifies a trial judge or counsel in being discourteous one to the other...." (*Etzel v. Rosenbloom* (1948) 83 Cal.App.2d 758, 762, emphasis in original.)

G. Count Two (A.6)

During the same *Elze* trial, Deputy District Attorney Brock objected on relevance grounds to a question by defense counsel Timothy Gomes about whether the defendant drank less or more when he went out as opposed to when he was at home. (Examiner's exh. 6, p. 3 33:7-8.) Judge Van Voorhis ruled that the evidence was admissible as character evidence to prove that the defendant had a pattern of behavior and had acted consistently with that behavior, (*Id.* at pp. 333:16-334:5.) The judge then directed Brock to agree that the evidence was relevant, and did not move on until she d*id.* (Examiner's exh. 3, p. 334:18-27.)

The masters concluded that the judge "abused his authority by forcing the prosecutor to agree with his ruling, admit to the jury that evidence to which she was objecting was relevant, and confess to the jury that she made a mistake." (Masters' rpt., p. 40.) The masters found the judge's testimony – that he "allowed Ms. Brock to be heard because he had to 'give her an opportunity to speak' and argue the evidence was not relevant" – was not credible, and that the judge "clearly badgered Ms. Brock into acquiescence." (Masters' rpt., p. 40.) The commission adopted this finding. (Commission decision, p. 23.)

The masters and the commission agreed that Judge Van Voorhis committed willful misconduct, (Commission decision, p. 23; masters' rpt., p. 41.) The judge acted in bad faith because his comments "served no proper purpose" and were made for the "corrupt purpose of venting his anger

and frustration." (Commission decision, p. 23.)[10] The judge's conduct went beyond mere negligence. (Cf. petition, p. 46.) The masters pointed out that "since the judge knew of no authority in California which permitted him to order a lawyer to confess her mistakes to the jury (R.T. 664:10-15), and he must have known that he could not, he acted with 'no regard' for whether his actions were legally permitted, and therefore was not 'acting with a purpose to faithfully discharge judicial duties.' (*Broadman v. Commission, supra*, 18 Cal.4th at p. 1092.)" (Masters' rpt., p. 41.)

The judge now contends that there is no evidence that he forced Brock to confess to the jury that she made a mistake, (Petition, p. 46.) However, the record clearly reflects that the judge told Brock, with the jury present, to state that the evidence was relevant:

> THE COURT: And so now you see the relevance of it; right? It's character evidence, obviously, and there has been a lot of it already, so it's clearly relevant; isn't it? Isn't it? Tell me.[11]
> MR. GOMES: No.[12]

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[10] The judge's claim that this finding "was based in large part on Ms. Brock's testimony regarding her subjective feelings[ ]" (petition, pp. 45-46) completely misstates the record.

[11] The judge testified that he paused each time he said, "Isn't it?," and when he said, "Tell me," waiting in vain for Brock to respond. (R.T. 692:4-13.)

[12] The commission adopted the masters' finding that "'[c]uriously, while the judge was looking at Ms. Brock for a response, the proponent of the evidence [Gomes] responded with no, that was not the legal theory for admissibility.'" (Commission decision, p. 23, fn. 25, quoting masters' rpt., p. 39, fn. 11.)

THE COURT: You tell me that it's relevant,
MS. BROCK: Do you want me to say that it's relevant, Your Honor?
THE COURT: Sure, it is; isn't it?[13]
MS. BROCK: Yes.

(Examiner's exh. 3, p. 334:18-27.) Although the judge did not use the words "tell the jury," he in effect instructed Brock to admit, in the jury's presence, that she had mistakenly objected to admission of the evidence (if not worse). The judge's conduct was equivalent to his conduct in count 2A.5, where he directed Brock to tell the jury that evidence she was seeking to admit "does not mean anything."

In his petition, the judge refers to Evidence Code section 352 and claims that a "special, two-step approach needed to be followed...." (Petition, p. 45.) This claim appears to be based on the judge's testimony that the reason he followed up with Brock was that he had to give her an opportunity to make a specific objection under section 352 (R.T. 675:16-676:1) and argue that the evidence was not relevant (R.T. 694:21-24). The judge testified that had he not "afford[ed] that opportunity," Brock would have been in a position to say, "I made the proper objection, relevance, and you never addressed or gave me an opportunity to argue that it was excludable under 352." (R.T. 695:18-22.)

The judge's testimony was absurd, and the masters correctly found that his explanation was not credible. (Masters' rpt., p. 40.) The judge never mentioned section

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[13] Brock testified that the judge actually said, "Sure. It is. Isn't it?" (R.T. 52:3; commission decision, p. 23, fn. 26; masters' rpt., p. 40, fn. 12.)

352 in his exchange with Brock and nothing in the exchange suggests that he was asking her if she had any further objection. Especially in light of the judge's earlier scolding of Brock after she renewed an objection[14] and his earlier insistence that she answer a similar question on a different subject so "I know you're with me,"[15] no reasonable person would interpret the exchange as inviting Brock to renew her objection. The judge's practice was quite the contrary; whenever he perceived any disagreement with his ruling, he found it necessary to attack the lawyer, as he did with Kathleen McMurray in the *Gotchall* case (see *supra* pp. 20-26) and Christine Meade in the *McDonald* case (see *supra* pp. 29-32), or have the lawyer admit to the jury that she was wrong, as he did with

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[14] After a lunch recess following the judge's ruling that the defendant's statements to the arresting officer were inadmissible, Brock indicated that she wanted to renew her objection on the record. The judge responded: "Don't renew objections. What for? Aren't I going to rule the same way? You just waste my time." (Examiner's exh. 3, p. 23:8-12.)

[15] Prior to trial, Brock had moved to exclude a defense videotape of the intersection where the offense took place. (Respondent's exh. 16, p. 17:510.) When the judge asked Brock how the video could not be relevant, the following colloquy took place:

> MS. BROCK: We're not aware of whether it was taken at the same time.
> THE COURT: It doesn't have to be; does it?
> MS. BROCK: If it's to show the conditions of the roadway –
> THE COURT: **Tell me the answer when I say that**, so I know you're with me, that you're not just foggy about it, because that is such a fundamental principle of evidence that I want to make sure you're with me on it.

(*Id.* at pp. 17:24-18:5, emphasis added.)

Brock the previous day in the *Elze* case (see *supra* pp. 32-34).

H. Count Two (B.1)

This charge pertains to the judge's mistreatment of temporary court clerk Kim Carmichael on July 13, 1999. The masters found that "the judge had a temper tantrum that included throwing files, and reduced a temporary clerk to tears." (Masters' rpt., p. 51.) In his opening brief to the commission, Judge Van Voorhis objected only to the masters' finding that the files "came down" on Carmichael; he did not object to the masters' conclusion that the judge had committed prejudicial misconduct. (See judge's OBC, p. 17.) The commission adopted the masters' finding that the judge threw the files and concluded that the judge committed prejudicial misconduct. (Commission decision, pp. 25, 28.)

The judge still asserts no objection to the conclusion that he committed prejudicial misconduct, He simply claims that (1) the phrase "temper tantrum" is "unfair" and exaggerates the incident; (2) the testimony was that he *tossed* the files, rather than *threw* them (petition, p. 47); and (3) his testimonial slip ("I know that at the instant I threw the files," R.T. 783:22-23) was taken out of context.

First, the masters did not exaggerate the incident when they called it a temper tantrum. Kim Carmichael testified that after the judge heard the in-custody calendar, he still had some case files for defendants who had voluntarily appeared on bench warrants or probation violations. (R.T. 147:19-148:6.) None of those defendants were in the courtroom, (R.T. 148:5, 590:1-4.) The judge was angry, took a four-inch thick stack of about six or seven files, and "threw" them in such a way that they tumbled onto

Carmichael's desk. (R.T. 148:13–149:8, 149:14-19.) In a very angry tone of voice, the judge said: "I have no bodies. I have these files. What's going on?" (R.T. 149:8-13.) Carmichael was in shock and started to tear up. (R.T. 150:1-4.) The judge told Carmichael to "find out where the bodies are." (R.T. 150:16.)

Second, whether the judge "tossed" or "threw" the files (whatever the distinction may be), he committed misconduct, Contrary to the judge's petition, Carmichael used both verbs to describe the conduct, (R.T. 148:16-18, 149:7-8.)

Third, the masters did not take out of context Judge Van Voorhis's slip that he "threw the files." The masters noted that the judge repeatedly denied throwing the files and claimed that if they fell from the ledge of his bench, it was accidental, (See masters' rpt., p. 44.) Before concluding that the truth "slipped out" when the judge testified about "the time I threw the files," the masters observed Judge Van Voorhis's demeanor and had before them all the evidence, including Carmichael's testimony.

I. Count Two (B.2)

The masters concluded that the judge committed prejudicial misconduct when he "unfairly berated an experienced clerk [Pat Van Horn] in open court for swearing in a bailiff in the customary manner." (Masters' rpt., p. 52.) The masters found that the judge "told Ms. Van Horn that she had wasted 20 seconds of the court's time by swearing the bailiff on the record[ ]" and was "red-faced, tense and upset with her." (Masters' rpt., pp. 46-47.) In his opening brief to the commission, the judge made several objections to the masters' factual findings, but did not object to their conclusion that he committed prejudicial

misconduct. (See judge's OBC, pp. 17-19.) The commission adopted the masters' findings and agreed that the judge committed prejudicial misconduct. (Commission decision, pp. 26, 28.)

Judge Van Voorhis argues that the allegation is not supported by clear and convincing evidence because Van Horn's testimony was "contradictory." (Petition, p. 50.) The judge, however, misstates the record in this regard. The judge correctly recites Van Horn's testimony that the judge told her that "they had a manual in [his] department and the manual would explain the correct way to do that procedure [swearing in the bailiff]." (R.T. 163:5-9.) However, contrary to the judge's argument, Van Horn did not retract this testimony during cross-examination. She simply testified on cross that she did not recall the judge telling her "specifically that his manual provided that the bailiff was to be sworn in silently." (R.T. 184:2-4.) She did recall the judge saying that she "needed to read the manual." (R.T. 184:4-5.)

Attorney Michael Markowitz corroborated Van Horn's testimony about the manual, He testified that the judge told Van Horn words to the effect that they do not swear in the bailiff on the record in his department and that if she had read the manual, she would know that is "not the way we do it." (R.T. 190:3-10.)

The judge also alleges that in Van Horn's written complaint to court administrator Melinda Morgado, she "did not say that Judge Van Voorhis accused her of being unfamiliar with or violating the department clerk's procedural manual and she erroneously contended that the incident occurred in the presence of the bailiff and the jury." (Petition, p. 51.) This misstates the record. Van Horn simply testified that she did not recall whether she told

Morgado in her complaint that the judge had accused her of violating his manual by not swearing in the bailiff silently. (R.T. 18 1:7-10.)[16] She was not asked about her prior statements about who was present during the incident, Judge Van Voorhis also objects to the inclusion of testimony from Van Horn regarding her subjective feelings about how the incident made her feel physically and emotionally. (Petition, p. 51.) As discussed *supra*, at pages 28-29, the judge's position on this lacks merit. Moreover, even without this evidence, the fact that the judge threw the files was enough to support a finding of prejudicial misconduct.

Finally, the judge argues that the commission should not have credited the testimony of Van Horn and Markowitz over his testimony. The judge argues that he "testified that he was 100% certain that he did not tell Ms. Van Horn that she wasted 20 seconds of his time...." (Petition, p. 51.) However, at the hearing, Judge Van Voorhis admitted that he told Van Horn that not swearing in the bailiff on the record "saves us *30* seconds of time." (R.T. 651:20, emphasis added.) In addition, the judge admitted in his verified answer that he "expressed a desire to Ms. Van Horn to dispose of cases in a more timely manner and ... stated an opinion that it is unnecessary to swear in the bailiff on the record," (Verified Answer of Bruce Van Voorhis to Notice of Formal Proceedings [docket #2], January 2, 2002, p. 15, ¶ 1.) These admissions support the commission's findings.

Although Judge Van Voorhis testified that, after the incident, he sat down at his computer and "wrote up exactly

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[16] Since the complaint was not offered into evidence (R.T. 180:7-11), the only evidence of its contents was Van Horn's testimony.

what happened[ ]" (R.T. 653:4-5), the judge did not produce his notes at the hearing, and we do not know whether the judge's write-up accurately reflected what happened or that his testimony accurately reflected what he wrote down.

J. Count Two (B.3)

The masters concluded that Judge Van Voorhis committed prejudicial misconduct when he took out his frustration with the sheriffs department by publicly humiliating Genoa Brown, a temporary security deputy. (Masters' rpt., p. 52.) The judge told Deputy Brown in open court that she "needed to learn how to do her job in his courtroom ... so he didn't blow his top in open court and Deputy LaFortune [the judge's bailiff] was going to show her how to do her job." (*Id.* at p. 50, citing R.T. 294:14-19.) When the judge made his remarks, he was angry, agitated and irritated, his jaw was clenched, and he was pointing his finger at Deputy Brown, (Masters' rpt., p. 50, citing R.T. 294:22-25, 295:2.) The judge's tirade occurred after he was informed that an in-custody defendant with a case on calendar had not been transported to court.

In his opening brief to the commission, Judge Van Voorhis objected to some of the masters' factual findings, but did not object to the conclusion that he committed prejudicial misconduct. (See judge's OBC, pp. 19-21.) The commission adopted the masters' findings and concluded that the judge committed prejudicial misconduct. (Commission decision, p. 28.)

The judge admits that he became upset with Deputy Brown and that his frustration with the sheriffs department did not justify his conduct. (Petition, pp. 52, 54.) However, the judge argues that the allegation of misconduct was not

supported by clear and convincing evidence. (Petition, p. 52.)

The judge claims that the factual findings should have included his purported reason for being upset with Deputy Brown. (Petition, p. 52.) The judge testified, without corroboration, that if "someone on the Court's list [of in-custody defendants] was not included in the [list of] prisoners to be transported" to the courthouse from the jail, "we" asked the sheriffs department to "alert me prior to my taking the bench at 8:30 in the morning of this problem...." (R.T. 636:23-25, 637:5-6.) The judge argues that Deputy Brown "did not follow the established procedure...." (Petition, p. 53.)

In fact, Deputy Brown *did* follow the established procedure. Deputy Brown had learned from the judge's regular security deputy, Deputy White, that she needed to inform someone if a person whose name was on the court's calendar was not coming to court. (Brown R.T. 297:12-14, 299:9-13.) When Deputy LaFortune arrived in court and before court started, Deputy Brown told him that inmate Kimberly Johnson's name was on the calendar, but that she was not appearing because the jail said her court date had been vacated. (Brown R.T. 290:24-291:3.) Deputy LaFortune responded, "Okay" (Brown R.T. 291:4-6), and did not tell her that she should do anything else (LaFortune R.T. 305:19-306:4).

Deputy LaFortune, who at the time of the hearing had been the judge's bailiff for the previous four years (R.T. 304:22-25), testified that it was his responsibility to "let the judge know if there was a problem, that someone had not been transported." (R.T. 3 10:2-12.) He did not relay the information to the judge before court started because he did not think it was necessary (R.T. 310:13-16, 315:9-13),

given information that the defendant's court date had been vacated (R.T. 305:17-306:1, 306:9-12). Although the judge testified that he wanted to get Deputy LaFortune to exchange information with Deputy Brown (R.T. 649:8-10), that was no excuse for the judge to direct his diatribe at Deputy Brown.

K. Count Two (C)

This allegation concerns the judge's statement in open court to the jurors in *People v. Sowande* that they could improve on their English and that "an English teacher would object to the wording" of one of their written questions. (Examiner's exh. 11, p. 3 18:12-19.) In his Proposed Findings of Fact and Conclusions of Law [docket #29], at page 39, the judge simply maintained that his comments to the jury did not support a finding of *willful* misconduct because the comments were not made in bad faith.

The masters found that the judge's criticism of the jurors' written question was "unnecessarily disparaging and embarrassing to the jury foreperson, as well as to the other members of the jury whose thought processes were represented in the question." (Masters' rpt., p. 58,) In his opening brief to the commission, Judge Van Voorhis objected to some of the masters' factual findings, but did not object to their conclusion that he committed prejudicial misconduct, (See judge's OBC, pp. 2 1-22.) The commission adopted the masters' findings and concluded that the judge committed prejudicial misconduct. (Commission decision, p. 30,)

The judge argues that he did not intend to demean or belittle the jurors, that he "felt he needed to explain why the jury was being brought out on this particular occasion to

hear his oral answer to the jury's written question," and that he "decided on the spur of the moment to tie the necessity of bringing out the jury to the imprecision of the question." (Petition, pp. 54-5 5.) However, the judge's intent or motivation "is not a significant factor in assessing whether prejudicial misconduct has occurred...." (*Adams v, Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878, citing *Gonzalez v. Commission, supra*, 33 Cal.3d at p. 376.)

The judge also points out that he offered his apologies to the masters during the hearing. (Petition, p. 54.) It is true that after the judge heard the testimony of two jurors, he took the witness stand and stated:

> I offer my apologies to the Court and the judges in the State of California. I understand how you must feel having heard the testimony.

(R.T. 416:19-21.) However, there is no evidence that Judge Van Voorhis, to whom the jurors had promptly sent letters of complaint (R.T. 393:20-394:1, 403:9-17), ever apologized to the jurors. As the court stated in *Fletcher v. Commission, supra*, 19 Cal .4th 865, "[t]he difficulty with [the judge's] professed enlightenment is its delayed arrival," (*Id.* at p. 921, quoting *Wenger v. Commission, supra*, 29 Cal.3d at p. 654.)

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III. THE SANCTION OF REMOVAL WAS JUSTIFIED BY THE NEED TO PROTECT THE PUBLIC, ENFORCE RIGOROUS STANDARDS OF JUDICIAL CONDUCT, AND MAINTAIN PUBLIC CONFIDENCE IN THE INTEGRITY AND INDEPENDENCE OF THE JUDICIAL SYSTEM.

A. The Number of Acts of Misconduct, the Judge's Prior Discipline, the Judge's Lack of Appreciation of his Misconduct, the Likelihood of Future Violations, and the Negative Impact of the Misconduct on the Judicial System Supported the Judge's Removal.

The commission's decision to remove Judge Van Voorhis specifically followed the Supreme Court's mandate not to focus on punishment, but on "the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system." (Commission decision, p. 31, quoting *Broadman v. Commission, supra*, 18 Cal.4th at pp. 1111-1112.) The commission identified five considerations relevant to its determination of discipline: the number of acts of misconduct, the judge's prior discipline, the judge's appreciation of his misconduct, the likelihood of future violations, and the impact of the misconduct on the judicial system. (Commission decision, pp. 32-36.) None of these considerations focuses on the punitive nature of discipline; rather, each focuses on the protection of the public and the judge's ability to conform to the Code of Judicial Ethics, Based on its observation of the judge, the special masters' observation of the judge, the judge's own statements, and all the evidence and arguments, the commission concluded

that it could not – consistent with its mandate to protect the public – allow the judge to remain on the bench.

Each of the factors relevant to the proper discipline weighs heavily against Judge Van Voorhis. First, the number of wrongful acts (11 over the course of 20 months) "is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing 'lack of temperament and ability to perform judicial functions in an evenhanded manner." [Citation.]" (*Kloepfer v. Commission, supra*, 49 Cal.3d at p. 866, quoting *Wenger v. Commission, supra*, 29 Cal.3d at p. 653.) In Judge Van Voorhis's case, the instances of misconduct have been "too numerous to permit us to speculate that [the judge] was guilty of misconduct only in isolated occasions which might be individually explained and excused," (Commission decision, p. 37, quoting masters' rpt., p. 60, and *Cannon v. Commission, supra*, 14 Cal.3d at p. 705, internal quotation marks omitted.)

Second, Judge Van Voorhis has prior public discipline for similar misconduct. In 1992, the commission publicly reproved the judge for misconduct that included using a "sarcastic and intimidating tone" toward attorneys, giving directions to his court staff on two occasions in a manner that was perceived to be harsh, and questioning two potential jurors in such a way that caused them to "perceive a lack of sensitivity and to feel intimidated by [the judge's] questioning." (Examiner's exh. 14, pp. 626-627.)[17] In determining that a public reproval would be adequate discipline on that occasion, the commission considered the

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[17] The judge also received a private admonishment in 1994 for issuing and signing Contra Costa County subpoenas in his own dissolution case in Solano County. (Examiner's exh. 15, p. 628.1.)

absence of prior discipline, the judge's "recognition that [he] should have handled the incidents differently," and the judge's "assurance that this conduct will not be repeated." (*Id.* at pp. 627-628; transcript of oral hearing, pp. 32:25-33:2.) Judge Van Voorhis did not fulfill his promise and did not learn from the public discipline.

Third, the judge "does not appear to recognize how the way he speaks and acts violates the Code of Judicial Ethics," (Commission decision, p. 50; see *Kloepfer v. Commission, supra*, 49 Cal.3d at p. 866 [judge's conduct demonstrates an "inability to appreciate the importance of and conform to, the standards of judicial conduct"].)

Fourth, "(1) because Judge Van Voorhis does not understand his misconduct, (2) because he has not presented any evidence of steps taken to learn about his misconduct or to control it, (3) and because he frankly admitted that the longer he is a judge the more likely it is that he will 'show his emotions,' the commission is convinced that Judge Van Voorhis will continue to violate the Code of Judicial Ethics if he is allowed to remain on the bench." (Commission decision, p. 50; see *Fletcher v. Commission, supra*, 19 Cal.4th at p. 921 [judge's perspective did not suggest that he had overcome his demonstrated lack of judicial temperament; accordingly, similar incidents were likely to recur]; *Kloepfer v. Commission, supra*, 49 Cal.3d at pp. 866-867 [record does not suggest that judge has, or will be able to, overcome "lack of judicial temperament"].)

Fifth, the judge's misconduct "interfere[d] with the administration of justice." (Commission decision, p. 47.) As the commission pointed out, "[j]urors heard inadmissible evidence, attorneys' credibility was improperly compromised in front of juries, and at least one

juror considered not deciding a case on the evidence because of the judge's insult," (*Id.* at p. 50.)

B. There Were No Significant Factors in Mitigation.

On the subject of mitigation, the character evidence that was introduced was "limited" (masters rpt., pp. 61-62), and the commission properly gave "little weight" to it. (Commission decision, p. 48.) This court has removed judges who introduced far more substantial and extensive character evidence than did Judge Van Voorhis. (See, e.g., *Adams v. Commission, supra*, 10 Cal.4th at p. 911; *Kloepfer v. Commission, supra*, 49 Cal.3d at p. 866, fn. 29; *Cannon v. Commission, supra*, 14 Cal.3d at p. 705.)

Of the eight witnesses whose testimony touched on the judge's character, two (William Gardner and Timothy Gomes) had each tried only one case in front of the judge (R.T. 449:10-12, 459:5-6); while one (Frederick Remer) had not tried any cases in front of him (R.T. 524:18-20). When witnesses were asked about the judge's demeanor, their responses were qualified; one attorney testified that he once had a case in which he thought the jury was "swinging away" from him because of the interaction Judge Van Voorhis was having with the prosecutor. (R.T. 531:21-23.)

The only judge other than Judge Van Voorhis to testify, former Presiding Judge Mark Simons, testified that when he brought Judge Van Voorhis to hear cases in Martinez, "on more than a few occasions there would be a series of complaints that would trail that appearance." (R.T. 2 11:5-7.) The complaints related to the judge's temperament. (R.T. 211:8-23, 213:21-215:18.) As a result, Judge Simons began to use Judge Van Voorhis less and less in Martinez because "the benefits began to be outweighed by the

problem-solving [that] was required after he helped out." (R.T. 215:22-25.)

C. A Judge May be Removed Even in the Absence of Bad Faith or Moral Turpitude.

At the oral hearing, Judge Van Voorhis argued that "[w]ithout bad faith, a judge cannot be removed from office for demeanor purposes." (Transcript of oral hearing, p. 24:19-20.) This misstates the law. A judge may be removed for prejudicial misconduct. (*Kennick v. Commission, supra*, 50 Cal.3d at p. 313; *McCullough v. Commission on Judicial Performance* (1989)49 Cal.3d 186, 191; Cal, Const., art VI, § 18(d).) Prejudicial misconduct requires no showing of bad faith.

Case law also does not support the judge's contention (see petition, p. 1) that removal requires a finding of corruption or moral turpitude. (See *Fletcher v. Commission, supra*, 19 Cal.4th at p. 919, fn. 24 [rejecting position of dissenting justice that removal is not warranted where "record lacks any hint that [the judge] is corrupt, venal, or biased"]; *Kloepfer v. Commission, supra*, 49 Cal.3d at p. 865 [judge removed despite fact that no charge suggested that judge was anything other than "person of unquestioned honesty and integrity"]; *Wenger v. Commission, supra*, 29 Cal.3d at p. 653 [judge removed even though there was "no evidence that he neglected his work or used his office for illicit gain"]; *Cannon v. Commission, supra*, 14 Cal.3d at p. 707 [judge removed despite fact that her unjudicial conduct "did not amount to moral turpitude, dishonesty or corruption"]; *Geiler v. Commission, supra*, 10 Cal.3d at p. 287 [same].)

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D. The Judge's Removal is Supported by Precedent.

In determining the appropriate discipline, each case must be considered on its own facts, "The factual variations from case to case are simply too great to permit a meaningful comparison in many instances." (*Broadman v. Commission supra*, 18 Cal.4th at 1112.) Where, as in this case, the record

> does not suggest that petitioner has, or will be able to, overcome this trait [of lack of judicial temperament] and that similar incidents will not recur[,] ... comparison of the discipline imposed in other cases, as petitioner suggests, is not fruitful. Our role is to determine, in the individual case, the action necessary to protect the public and the reputation of the judiciary.

(*Kloepfer v. Commission, supra*, 49 Cal.3d at pp. 866-867.)

Nevertheless, the sanction of removal is supported by prior opinions of this court. In *Adams v. Commission, supra*, 10 Cal.4th 866, the court stated that in past removal cases, the judge's wrongdoing

> generally has involved a pattern of arbitrary, irrational, and inappropriate conduct of the judge while acting on the bench in dealings with litigants, attorneys, witnesses, and other persons, or while otherwise performing his or her judicial functions, and an abuse of his or her judicial powers and authority.

(*Id.* at pp. 912-913.)

In *Fletcher v. Commission, supra*, 19 Cal.4th 865, the court removed a judge who committed willful misconduct on two occasions and prejudicial misconduct on multiple occasions. (*Id.* at p. 918.) The court found that "the record as a whole establishe[d] a consistent pattern of misconduct that reflects a lack of judicial temperament." (*Id.* at p. 877.)

In *Ryan v, Commission, supra*, 45 Cal.3d 518, the court removed a judge for four acts of willful misconduct and fourteen acts of prejudicial conduct. (*Id.* at p. 547.) The court found that the judge's conduct exhibited a "pattern of personal embroilment in cases assigned to him" and that the judge had "lost his temperance and objectivity on several occasions, resulting in prejudice to the parties appearing before him or in abuse of his contempt power." (*Id.* at pp. 546-547.)

In *Cannon v. Commission supra*, 14 Cal.3d 678, the court removed the judge after concluding that she had engaged in a course of conduct which had "maligned the judicial office and clearly establishe[d] her lack of temperament and ability to perform judicial functions in an even-handed manner." (*Id.* at p. 707.) The court did not give credence to Judge Cannon's efforts to explain that her conduct was the result of "frustrations provoked by 'inexperienced and sometimes disrespectful lawyers' from the office of the public defender," (*Id.* at p. 706.)

In *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, the court removed a judge for 11 incidents of misconduct (*id.* at pp. 783-784), including treating attorneys in a "cavalier, rude and improper manner." (*Id.* at p. 786.) The court ordered the judge's removal because it could not "tolerate the risk of recurrence of [the judge's] conduct...." (*Id.* at p. 802; see also *Doan v. Commission, supra*, 11 Cal.4th at pp. 339-340 [removing

judge who failed to learn from prior discipline for similar misconduct].)

The two cases cited by Judge Van Voorhis in which the commission publicly admonished judges for demeanor misconduct (see petition, pp. 18-20) are distinguishable. In 1997, the commission admonished Judge Williams (Pub. Adm. No. 7) for improper remarks to two attorneys who appeared before him in one case. The remarks were not made in front of a jury and did not affect the outcome of the case. There was no indication that the judge had previously been disciplined, and there had been "substantial improvement" in the judge's judicial demeanor and temperament since the misconduct.

In 2000, the commission admonished Judge Coates (Pub. Adm. No. 23) for conduct that included five violations of canon 3B(4). Only one of the incidents involved misconduct during testimony in a jury trial, and the judge rectified the situation by granting a motion for a new trial and recusing himself from the case.

IV. THE COMMISSION PROPERLY CONSIDERED EVIDENCE THAT JUDGE VAN VOORHIS DOES NOT APPRECIATE THE INAPPROPRIATENESS OF HIS ACTIONS AND IS LIKELY TO ENGAGE IN UNETHICAL CONDUCT IN THE FUTURE.

Judge Van Voorhis argues that it was improper for the commission, in deciding the level of discipline, to consider whether he "appreciates the inappropriateness of his actions" and "is likely to engage in unethical conduct in the future," (Petition, p. 55.) Both of these considerations are clearly relevant. (See *Fletcher v. Commission, supra*, 19 Cal.4th at pp. 920-92 1 [judge removed where record demonstrated "an inability to appreciate the importance of,

and conform to, the standards of judicial conduct" and "does not suggest that petitioner has, or will be able to, overcome [his demonstrated lack of judicial temperament] and that similar incidents will not recur," quoting *Kloepfer v: Commission supra*, 49 Cal.3d at p. 866].)

The commission's conclusion that Judge Van Voorhis did not appreciate the inappropriateness of his actions was not based on the fact that he defended his conduct, Instead, it was based on the nature of the defenses proffered, the judge's testimony and demeanor before the masters, and his personal presentation to the commission. Indeed, the judge did not even recognize that he had a demeanor problem. He testified that subsequent to the Kim Carmichael incident, when he wrote to Presiding Judge Simons that "I recognize the need to resolve this problem," he was referring to the problem that "people often misunderstand me. They don't perceive really where I'm coming from, what I'm about, and what it means when I do what I do." (R.T. 787:19-788:2.) When asked at the evidentiary hearing if he believed he had a demeanor problem, the judge testified: "I'm special compared to other people in that category." (R.T. 788:13-14.) According to the judge, other people mistake signals from him, and his behavior does not "mean[ ] the same for me as it does for you." (R.T. 789:1-6.) Without recognition that he has a problem and that he needs to change his conduct, Judge Van Voorhis has no hope of reforming.

In addition to having little understanding of his own conduct, Judge Van Voorhis appears to have no concept of how to properly respond to others' conduct. He permits himself to be provoked by the most innocuous statements of attorneys and others who appear in front of him, For example, on count 2A.2, Judge Van Voorhis testified that

Kathleen McMurray was unusually obstinate (R.T. 744:4-6) and continued to "press the admissibility" of the HGN evidence, when in fact she was simply responding to the judge's questions. (See *supra* pp. 25-26.) On count 2A.5, when Stacey Brock asked a question about an HGN test and said that "we won't be offering any results of it, your honor" (examiner's exh. 3, p. 57:27-28), the judge believed that Brock "had gone way out of bounds" (R.T. 664:7-8), that she was "attempting to undermine my power to rule that this was not admissible evidence" (R.T. 668:22-23, 687:17-20), that she was trying to "get the jury to see it her way" (R.T. 665:11-13, 687:2-7), and that "really severe action was required" on his part to restore fairness (R.T. 664:8-9). With respect to count 2B(3), the judge found it necessary to reprimand Deputy Brown even though he admitted that she did not demonstrate a lack of respect to the court (R.T. 644:21-24) and he did not know whether it was "her fault" that he had not been informed that an in custody defendant had not been transported to court. (R.T. 647:9-13.) With respect to count 2C, the judge was so preoccupied with the defense attorney's strategy in accepting his offer to bring the jury out to hear the answer to a jury question that the first thing that popped into his mind was to criticize the jurors' English. (See R.T. 418:6-19, 419:19-420:16, 710:9-712:23.)

Similarly, the commission's conclusion that Judge Van Voorhis is likely to continue to engage in unethical conduct is not based on the fact that he contested the charges, but on all the evidence, including the judge's testimony before the masters and his presentation to the commission. The judge's misconduct has persisted despite repeated warnings. The judge engaged in similar misconduct that resulted in a public reproval in 1992. In August 1999,

following the incident involving Kim Carmichael, then Presiding Judge Simons told Judge Van Voorhis that the misconduct "should not, could not be" repeated (R.T. 205:5-9), and that the most likely way to assure this was for Judge Van Voorhis to enroll in a counseling or anger management program. (R.T. 203:20-204:9.) Judge Van Voorhis replied that he was not going to take part in either program, but that he had private resources available if he decided that was the appropriate step to take. (R.T. 204:16-21.)

Judge Van Voorhis's temperament problem became worse, (Masters' rpt., p. 59, ¶ 3.) All but two of the charged instances of misconduct took place after Judge Simons's warning. Judge Van Voorhis admitted that the longer he stays on the bench, the more he shows his "feelings." (R.T. 574:16-18.) The commission properly found that "it is not only likely, but close to a certainty that Judge Van Voorhis, if allowed to remain on the bench, will continue to violate the Code of Judicial Ethics." (Commission decision, p. 44.)

V. DUE PROCESS DOES NOT REQUIRE A SEPARATE DISPOSITIONAL HEARING PRIOR TO THE IMPOSITION OF DISCIPLINE.

Judge Van Voorhis argues that due process requires a dispositional hearing prior to the imposition of discipline. (Petition, p. 56.) He contends that "where the allegations of misconduct are disputed, dispositional evidence cannot reasonably be placed before the Masters." (Petition, p. 57.)

In addition to waiving this issue by not timely requesting a separate hearing, the judge was not prejudiced by the lack of such a hearing. The judge did place dispositional evidence before the masters. He called four witnesses and submitted one declaration in an attempt to

prove that he was a fair, hard-working, intelligent, efficient judge who stays current with applicable law, (See R.T. 520:9-52 1:16, 525:3-25, 530:14-25, 597:6-598:15; respondent's exh. 13, ¶¶ 3-4.) Nothing in the record indicates that Judge Van Voorhis was not permitted during the hearing to introduce evidence of improved behavior, or other evidence in mitigation of sanctions.

In addition, the judge was on notice that the hearing before the masters was the appropriate time to submit evidence in aggravation or mitigation. Commission rule 125, which addresses how evidence is presented at the evidentiary hearing, provides that "[a]ny prior disciplinary action may be received in evidence to prove that conduct is persistent or habitual or to determine what action should be taken regarding discipline." (Rules of Corn, on Jud. Performance, rule 125(b).) Such evidence (examiner's exhs. 14-15) was received without objection (R.T. 23 :4-19). Implicit in rule 125 is that matters affecting the level of discipline to be imposed are considered at the special masters' hearing.

The judge was also on notice that the commission, following the oral hearing, would issue a decision on sanctions. Commission rule 130(a) provides that the opening briefs to the commission may include "points and authorities concerning the issues in the case, including the issue of sanctions." The judge briefed and orally argued the issue of sanctions to the commission, without requesting a separate dispositional hearing.

If Judge Van Voorhis wanted a separate dispositional hearing, he should have requested it well before the commission's order of removal, and at least by the time that he learned in September 2002 that the masters had found that he committed misconduct on 11 occasions,

Commission rule 133(a) provides that the commission "may order a hearing for the taking of additional evidence at any time while the matter is pending before it." The judge, however, waited until after the commission issued its order of removal, at which time he "demanded" such a hearing. (See letter from James A. Murphy to Richard Schickele [docket #48], March 3, 2002, p. 1.) The "demand" did not mention what evidence the judge intended to present or why it could not have been presented at the hearing before the masters, The demand was denied on March 12, 2003. (See docket #50.)

This court has never required a separate dispositional hearing in judicial disciplinary cases, (See, e.g., *Broadman v. Commission, supra*, 18 Cal.4th at pp. 1088, 1112 [judge presented 20 mitigation witnesses before special masters; masters' hearing completed before commission made findings of misconduct]; *Gonzalez v. Commission, supra*, 33 Cal.3d at pp. 364, 377 [judge offered character evidence at masters' hearing to mitigate punishment; masters' hearing completed before commission made findings].)

Even had the judge timely requested a separate hearing, due process would not have required one. In *Boggan v. Judicial Inquiry Commission* (Ala. 1999) 759 So.2d 550, the court rejected the judge's due process claim that his disciplinary trial should have been bifurcated, with the first part being concerned only with the question of guilt and the second being concerned with sanctions. (*Id.* at p. 553.) Since the judge had "fair notice" that evidence in mitigation could be offered at the trial, the court held that he had received due process. (*Id.* at p. 554.)

//
//

CONCLUSION

The commission's determination to remove Judge Van Voorhis from office was soundly based on the facts and conclusions and precedent. Due to the pattern of misconduct, the judge's failure to reform after prior discipline and a warning from his presiding judge, the judge's failure to appreciate the nature of his misconduct, the likelihood of future violations, and the impact of the judge's misconduct on the judicial system, the commission properly removed Judge Van Voorhis from judicial office. The petition for review should be denied.

Dated: July 7, 2003.

Respectfully submitted, -

/s/

Jack Coyle, Attorney for Commission on Judicial Performance

CERTIFICATE OF WORD COUNT
California Rules of Court, rule l4(c)(1)

The undersigned, attorney for the Commission on Judicial Performance in this matter, hereby certifies that the foregoing brief (excluding the tables of contents and authorities) contains 16,017 words, as reported on the word count of the computer program used to prepare the brief.

Dated: July 7, 2003.

/s/
Jack Coyle
Attorney for Commission on
Judicial Performance

PROOF OF SERVICE

I, Kathleen A. Vota, the undersigned, am a citizen of the United Sates, over the age of 18 years, and not a party to or interested in the within action. My business address is 455 Golden Gate Avenue, Suite 14424, San Francisco, California 94102.

On July 7, 2003, I served the attached:

Answer to Petition for Review of Determination
by Commission on Judicial Performance
(Rule 935)

on all interested parties in said cause, by delivering a true copy as follows:

[ ] **(BY MAIL)** I placed the original or a true copy thereof enclosed in a sealed envelope with postage thereon fully prepa*id.* I deposited said envelope in the United States mail in the City and County of San Francisco, California. I am readily familiar with our office's practice for collection and processing of correspondence for mailing with the United States Postal Service, that this mailing will be deposited with the United States Postal Service on this date in the ordinary course of business and that I sealed and placed each envelope for collection and mailing on this date following ordinary business practices.

[ ] **(BY FEDERAL EXPRESS)** I sent the original or a true copy thereof enclosed in a sealed envelope to be delivered to Federal Express for overnight service to the office(s) of the addressee(s).

[X] (**BY HAND DELIVERY**) I placed the original or a true copy thereof enclosed in a sealed envelope to be hand-delivered on this same date by SILVER BULLET MESSENGER SERVICE to the office(s) of the addressee(s).

[ ] (**BY TELECOPIER**) In addition to service by mail as set forth above, the counsel by whose name an asterisk is affixed on the service list were also forwarded a copy of said document(s) by telecopier.

James A. Murphy, Jr., Esq.
Murphy, Pearson, Bradley & Feeney
88 Kearny Street, Tenth Floor
San Francisco, CA 94108-5530
FAX: (415)393-8087

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 7, 2003, at San Francisco, California.

/s/
Kathleen A. Vota

RECEIVED
JUL 07 2003
By: _____

Jack Coyle, State Bar No. 149238
Bradford L. Battson, State Bar No. 110178
Commission on Judicial Performance
Office of Trial Counsel
455 Golden Gate Avenue, Ste. 14424
San Francisco, CA 94102
Telephone: (415) 557-1200

Attorneys for
Commission on Judicial Performance

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BRUCE VAN VOORHIS, JUDGE OF THE SUPERIOR COURT OF CONTRA COSTA COUNTY, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.	No. S116146 [Commission on Judicial Performance Inquiry No. 165] MOTION TO TAKE JUDICIAL NOTICE; POINTS AND AUTHORITIES; DECLARATION; PROPOSED ORDER [CRC Rule 22]

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JUL 07 2003
By: _____

The Commission on Judicial Performance moves this court for an order to take judicial notice of the following documents:

1. The court's records in *Platt v. Commission on Judicial Performance,* No. S111125, review denied, Feb. 19, 2003; *Couwenberg v. Commission on Judicial Performance*, No. S102066, review denied, Jan. 16, 2002; and *Ross v. Commission on Judicial Performance*, No. S071464, review denied, Nov. 18, 1998. (Due to the length of the records in these cases, it is not practicable to attach copies of the court's records to this motion.)

2. The Biennial Review of the Rules of the Commission on Judicial Performance: Adoption of an Interim Change to a Rule of the Commission on Judicial Performance and Invitation to Comment on Proposed Amendments, dated October 18, 2002. (A copy of this document is attached as exhibit A.)

3. Report of the Commission on Judicial Performance Regarding Adoption of Modifications to Rules and a Policy Declaration at its January 29, 2003 Meeting. (A copy of this document is attached as exhibit B.)

A proposed order is attached as exhibit C.

The above documents are relevant to the issue of whether the absence of the commissioners from evidentiary hearing before the special masters comported with the commission's procedures and regulations. (See Petition for Review [hereinafter "petition"], pp. 5-8; Answer to Petition for Review [hereinafter "answer"], pp. 5-13.) The documents were not included in the record of the commission's proceedings in this case because Judge Van Voorhis did not raise this issue before the special masters or the commission.

POINTS AND AUTHORITIES

1. THE COURT MAY TAKE JUDICIAL NOTICE OF ITS RECORDS IN OTHER CASES.

A reviewing court may take judicial notice of any matter specified in Evidence Code section 452. (Evid. Code §459(a).) Under Evidence Code section 452(d) (providing for judicial notice of "[r]ecords of (1) any court of this state [ ]"), this court may take judicial notice of its own records. (See, e.g., *City of Sacramento v. State Water Resources Control Board* (1992) 2 Cal.App.4th 960, 968, fn. 3 [taking judicial notice of court of appeal's file in another case].) The court may take judicial notice of matters not before the trial court (*Doers v. Golden Gate Bridge, Highway and Transportation District* (1979) 23 Cal. 3d 180, 184, fn. 1), even where the trial court was not requested to take such notice (*Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125).

The cases listed in paragraph 1, *supra – Platt v. Commission on Judicial Performance,* No. S111125, review denied, Feb. 19, 2003; *Couwenberg v. Commission on Judicial Performance*, No. S102066, review denied, Jan. 16, 2002; and *Ross v. Commission on Judicial Performance*, No. S071464, review denied, Nov. 18, 1998 – are the only three cases which have been before this court and which involve any special masters' hearing that took place subsequent to December 1, 1996, the effective date of new commission rules 101-138. The records of these cases demonstrate that no commissioner was present at any special masters' hearing in those cases. This supports the commission's contention that commission rule 134 has never been interpreted to require the commissioners who

vote to impose discipline to be present at any hearing before the masters. (See Answer, p. 7.)

II. THE COURT MAY TAKE JUDICIAL NOTICE OF COMMISSION REPORTS

Evidence Code section 452(c) provides that the court may take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of ... any state of the United States. "Official acts" under section 452(c) "include records, reports and orders of administrative agencies." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518; see also *Smith v. Workers' Compensation Appeals Board* (2002) 96 Cal.App.4th 117, 112, fn. 3 [taking judicial notice of publications and other information available from the Contractors State License Board]; *People v. Goodloe* (1995) 37 Cal.App.4th 485, 493 [taking judicial notice of Department of Corrections' administrative bulletin]; *City of Sacramento v. State Water Resources Control Board, supra,* 2 Cal.App.4th at p. 966, fn. 2 [taking judicial notice of minutes of regional water board]; *Social Services Union v. City and County of San Francisco* (1991) 234 Cal.App.3d 1093, 1098, fn. 3 [taking judicial notice of minutes of minutes of civil service commission meeting]; *Smith v. State Bar* (1989) 212 Cal.App.3d 971, 975 [trial court properly took judicial notice of State Bar's "Instructions for Applicants" since State Bar has been treated as governmental agency]; *Hogen v. Valley Hospital, supra,* 147 Cal.App.3d at p. 125 [taking judicial notice of files of Board of Medical Quality Assurance]; *Michaels v. Watson* (1964) 229 Cal.App.2d 404, 407 [taking judicial notice of biennial reports made by State Board of Equalization].) Since reports of the Commission on

Judicial Performance are "[o]fficial acts" under section 452(c), this court may take judicial notice of them.

The commission's reports, listed in paragraphs 2 and 3, *supra*, are relevant to show the context of the January 2003 amendment to rule 134 as part of the biennial review of the commission's rules. (See answer, p. 8.) In particular, they rebut Judge Van Voorhis's contention that the commission amended rule 134 in an ex post facto attempt to legitimize the masters' hearing. (See petition, p. 7.)

Dated: July 7, 2003 Respectfully submitted

/s/
Jack Coyle, Attorney for
Commission on Judicial
Performance

DECLARATION

I, Victoria B. Henley, declare:

1. I am an attorney licensed to practice law in California. I am the Director-Chief Counsel of the Commission on Judicial Performance.

2. Attached as exhibit A is a true and correct copy of the commission's report entitled "Biennial Review of the Rules of the Commission on Judicial Performance: Adoption of an Interim Change to a Rule of the Commission on Proposed Amendments," dated October 18, 2002.

3. Attached as exhibit B is a true and correct copy of the "Report of the Commission on Judicial Performance Regarding Adoption of Modifications to Rules and a Policy Declaration at its January 29, 2003 Meeting."

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 7, 2003, at San Francisco, California.

/s/
Victoria B. Henley

EXHIBIT A

[The Great Seal of the State of California]
State of California
Commission on Judicial Performance
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102
(415) 557-1200 FAX (415) 557-1266

Date: October 18, 2002

To: Persons and Organizations Interested in Rules Relating to Proceedings of the Commission on Judicial Performance

From: Commission on Judicial Performance
Victoria B. Henley, Director-Chief Counsel

Subject: Biennial Review of the Rules of the Commission on Judicial Performance: Adoption of an Interim Change to a Rule of the Commission on Judicial Performance and Invitation to Comment on Proposed Amendments

---

Policy Declaration 3.5 of the Commission on Judicial Performance provides that every two years, in even-numbered yeas, the commission should review its rules and any proposed enactments, amendments or repeals, and seek public comment.

Since March 1999, the Commission on Judicial Performance has adopted one interim amendment to its rules: rule 102(); and approved amendments to the following rules for circulation for public comment: rule 102(e), rule 102(k), rule 109(d), rule 114, rule 116, rule

122(c), rule 129(b), rule 133(b), and rule 134. These amendments with brief explanations for the changes are attached.

As part of its 2002 review of its rules, the Commission on Judicial Performance invites comments on the proposed amendments to its rules and suggestions regarding any other changes or additions to rules.

A form for submission of comments is attached. The deadline for comments is December 16, 2002.

Comments may be submitted by mail or facsimile to:

Commission on Judicial Performance
Attn: Richard Schickele, Commission Counsel
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102
FAX: (415) 557-1266

For further information about the Commission on Judicial Performance, see the Commission's Web site at www.cjp.ca.gov.

/s/
Victoria B. Henley
Director-Chief Counsel

Attachments

COMMENT

Interim and Proposed Amended Rules Regarding
The Commission on Judicial Performance

Please copy this sheet. Use a separate sheet for each issue.

Rule:

Issue:

Comment:

Alternative proposal:

(Continue on back or on a separate sheet.)

Name: _____ Title: _____
Address: _____
Telephone: _____

Your comment may become public during the review of the proposed amended rules regarding the Commission on Judicial Performance. Thank you for your assistance,
Please return by December 16, 2002

Commission on Judicial Performance
Attn: Richard Schickele, Commission Counsel
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102
FAX: (415) 557-1266

[PROPOSED AMENDMENT]

Rule 102 Confidentiality and Disclosure

(e) (Disclosure to complainant) Upon completion of an investigation or proceeding, the commission shall disclose to the person complaining against the judge that the commission (1) has found no basis for action against the judge *or determined not to proceed further in this matter*, (2) has taken an appropriate corrective action, the nature of which shall not be disclosed, or (3) has publicly admonished, censured, removed, or retired the judge, or has found the person unfit to serve as a subordinate judicial officer. The name of the judge shall not be used in any written communication to the complainant, unless formal proceedings have been instituted. Written communications to the complainant in which the judge's name is not used shall include the date of the complaint as a cross-reference

...

Explanation of amendment: The amendment clarifies that the commission's decision to close a matter is not necessarily a determination that the complaint was without merit. A number of other factors may be considered by the commission such as a jurist's retirement or resignation, and the pendency of other allegations. The existing rule could be read as implying that the commission's decision to close a matter constituted a finding that the complaint was without merit.

[INTERMIM AMENDMENT
Adopted May 9, 2001)

Rule 102 Confidentiality and Disclosure

(h) (Disclosure of records ~~of disciplinary action~~ to public entity upon request or consent of judge) If a judge or former judge requests or consents to release of commission records e d4seip-lieary-aeti~en to a public entity, the commission may release ~~those~~ *that judge's* records.

[Adopted as interim rule 5/9/01.]

...

Explanation of amendment: This rule concerns what materials the commission may release to a public entity when a judge requests or consents to the release of commission records. The amendment permits, but does not require, the release of commission records relating to a judge, whether or not the proceeding resulted in discipline. The prior rule could be read to allow only the release of the actual disciplinary action (e.g. the advisory letter or private admonishment). The amendment also clarifies that only records relating to the requesting judge may be released to a public entity.

[PROPOSED AMENDMENT]

Rule 102 Confidentiality and Disclosure

(k) (Disclosure of information to public entities upon retirement or resignation) If a judge retires or resigns from judicial office after a complaint is filed with the commission, ~~at the time of closing the complaint, investigation or other proceeding~~, the commission may, in the interest of justice or to maintain public confidence in the administration of justice, release information concerning the complaint, investigation and proceedings to the State Bar, to prosecutorial agencies, to state or federal authorities responsible for judicial appointments, to regulatory agencies, or to the Chief Justice of the California Supreme Court, provided that the commission has ~~completed~~ *commenced* a preliminary investigation *and the judge has had an opportunity to respond to the commission's preliminary investigation letter.*

Explanation of amendment: Prior to 1995, the commission's jurisdiction over a judge came to an end when the judge retired or resigned. Accordingly, it was determined that the commission should be authorized to pass on its information, where appropriate, to the State Bar, to prosecutorial agencies, to authorities responsible for judicial appointments, to regulatory agencies and the to Chief Justice of the California Supreme Court. The existing rule could be read as limiting the commission to releasing information in closed cases only at the time of the closing

of the case. Questions arose when a judge retired or resigned while the commission's investigation was pending and where the investigation continued for some time after the judge's retirement or resignation. The amendment allows the commission to release, to the enumerated public entities, information concerning a judge who has resigned or retired even if the commission has not closed the investigation, as long as the judge has had an opportunity to respond to the allegations in the commission's preliminary investigation letter.

[PROPOSED AMENDMENT]

Rule 109 Confidentiality and Disclosure

(d) (Notification of disposition at the judge's request) Upon ~~written~~ request from a. judge who is the subject of a complaint before the commission, the commission shall notify the judge in writing of the disposition of the complaint if:

(1) The judge's request to the commission specifically describes the underlying incident giving rise to the complaint;

(2) The pendency of the complaint has become generally known to the public; or

(3) The judge has received written notice of the complaint from someone who is not associated with the commission.

Explanation of amendment: The amendment allows a judge to verbally request information concerning the disposition of a complaint against the judge. The existing rule requires that the request be in writing.

[PROPOSED AMENDMENT]

Rule 114 Private Admonishment Procedure

...

~~This rule applies to notices of intended private admonishment issued after the effective date of these rules~~.

Explanation of amendment: The rule was adopted in 1996, All proceedings initiated before the effective date of the amendment were disposed of years ago.

[PROPOSED AMENDMENT]

Rule 116 Public Admonishment Procedure

...

~~This rule applies to notices of intended public admonishment after the effective date of these rules.~~

Explanation of amendment: The rule was adopted in 1996. All proceedings initiated before the effective date of the amendment were disposed of years ago.

[PROPOSED AMENDMENT]

Rule 122 Discovery Procedures

(c) (Initial discovery *provided* by trial counsel) At the time of service of the notice of formal proceedings, the judge shall be provided copies of all documents and other information specified in rule 122(e) which is not privileged and is in the possession of the commission. Such information shall be made available at the commission offices. *Alternatively, if a judge requests that the materials be sent to a specific address, the commission shall provide the judge with copies of said documents and information at that address.*

...

Explanation of amendment: The amendment continues the provisions that the judge is entitled to discovery at the time of service of the notice of formal proceedings and that discovery is available at the commission offices, and adds, as an alternative, a provision allowing a judge to request that the materials be sent to a specific address. The change in the title clarifies that the subsection covers the provision of documents and information by the commission to the judge.

[PROPOSED AMENDMENT]

Rule 129 Report of Masters

...

(b) (Submission of proposed findings of fact and conclusions of law) Within ~~20~~ *30* days after completion of the hearing transcript, the examiner and the respondent judge shall submit to the masters proposed findings of fact and conclusions of law, with citations to the transcript and exhibits, unless the masters waive the submission of such proposed findings and conclusions.

...

Explanation of amendment: The commission's experience suggests that the examiner and the respondent judge need more time after receipt of the hearing transcript to prepare detailed proposed findings and conclusions for the masters.

[PROPOSED AMENDMENT]

Rule 133 Hearing Additional Evidence

...

(b) In any case in which masters have been appointed, the hearing of additional evidence ~~shall~~ *may* be before such masters *or before the commission*, and the proceedings therein shall be in conformance with the provisions of rules 121 to 130 inclusive.

Explanation of amendment: The amendment provides that the commission may in its discretion either consider additional evidence itself, or refer the additional evidence to the masters. The existing rule may be read as requiring that additional evidence be referred to the masters. The amendment allows the commission to avoid undue delay and expense where the additional evidence is not critical to the masters' report or where it is not feasible to refer the matter back to the masters.

[PROPOSED AMENDMENT]

Rule 134 Commission Vote

...

The commission may privately or publicly admonish, censure, remove or retire a judge, of find a person unfit to serve as a subordinate judicial officer. The affirmative vote of six members of the commission who have considered the record and report of the masters and who were present at any oral hearing as provided in rule ~~121~~ *132* or, when the hearing was before the commission without masters, of six members of the commission who have considered the record, and at least four of whom were present when the evidence was produced, is required for a private or public admonishment, censure, removal or retirement of a judge, or a finding that a person is unfit to serve as a subordinate judicial officer, or for dismissal of the proceedings.

Explanation of amendment: The amendment clarifies that the affirmative vote of six members of the commission who were present at the hearing before the commission as provided in rule 132 are required for the imposition of discipline. The existing rule allows for some confusion between evidentiary hearings before the commission or masters (rule 121) and hearings before the commission when the masters have issued a report (rule 132).

EXHIBIT B

REPORT OF THE COMMISSION ON JUDICIAL PERFORMANCE REGARDING ADOPTION OF MODIFICATIONS TO RULES AND A POLICY DECLARATION AT ITS JANUARY 29, 2003 MEETING

In 1995, after the passage of Proposition 190, the Commission on Judicial Performance was vested with the authority to promulgate rules governing commission proceedings, After extensive review, the commission adopted new and revised rules in 1996.

In October 2002, the commission circulated various proposals for changes and additions to the rules – including one interim rule for public comment. Except for the interim rule, the proposals were the result of the commission's biennial review of its rules, pursuant to Policy Declaration 3.5. At its January 29, 2003 meeting, the Commission amended the following rules: Rule 102(e), Rule 102(h), Rule 102(k), Rule 109(d), Rule 114, Rule 116, Rule 119(b), Rule 122(c), Rule 129(b), Rule 130(a), Rule 133(b), and Rule 134. Also, Policy Declaration 4.6 was amended at that time.

The changes to the rules adopted by the commission are summarized below; the text of each rule and policy declaration amendment is attached.

Rule 102(e) (Disclosure to complainant)

The purpose of the change was to clarify that the commission's decision to close a matter is not necessarily a determination that the complaint was without merit. A number of other factors maybe considered by the commission such as a judge's retirement or resignation, the allegations were stale, any misconduct was de minimis, or

other allegations of the same type afforded a stronger basis for discipline. The existing language could be read as implying that the commission's decision to close a matter constituted a finding that the complaint was without merit.

One comment was received suggesting that the specific basis for closing a matter should be set forth. The commission, however, determined that such specification would be unduly burdensome and might unnecessarily prolong investigations to determine which alternative was more appropriate (e.g., whether complaint was unfounded or de minimis when it should be closed in either event).

Rule 102(h) (Disclosure of records to public entity upon request or consent of judge)

The purpose of this change, which was initially adopted as an interim rule, was to permit the release of commission records relating to a judge to a public entity when a judge requests or consents to the release. whether or not the commission proceedings had resulted in discipline. The prior rule could be read to allow only the release of the actual disciplinary action (e.g., the advisory letter or private admonishment). The change also clarifies that only records relating to the requesting judge may be released to a public entity.

One comment was received suggesting that a judge's request for the release of records should always be honored, The commission determined that although a judge's request should be considered carefully, the commission should retain discretion to decline to release its records or to limit the records released.

//

//

Rule 102(k) (Disclosure of information to public entities upon retirement or resignation)

The purpose of the change was to allow the commission to release, to the enumerated public entities, information concerning a judge who had resigned or retired – even if the commission has not closed the investigation – as long as the judge has had an opportunity to respond to the allegations in the commission's preliminary investigation letter. The existing rule could be read as limiting the commission to releasing information only on a closed case and only at the time of closure. The change was unopposed.

Rule 109(d) (Notification of disposition at the judge's request)

The purpose of the change was to allow a judge to verbally request information concerning the disposition of a complaint against him or her. The existing rule requires that the request be in writing.

One comment was received suggesting that a judge's request for release of records should be in writing. The commission determined that, as a request for notification of disposition is not a request for the release of any records, it could be made verbally in order to facilitate the process for judges.

Rule 114 Private Admonishment Procedure

The change removed as surplusage language limiting the rule's application to proceedings initiated after the rule's adoption in 1996. The change was unopposed.

Rule 116 Public Admonishment Procedure

The change removed as surplusage language limiting the rule's application to proceedings initiated after the

rule's adoption in 1996. The change was unopposed.

Rule 119(b) (Filing of answer)

The change was purely technical – to conform the reference to the appropriate revised rule of the California Rules of Court.

Rule 122(c) (Initial discovery provided by trial counsel)

The rule as amended continues the provisions that the judge is entitled to discovery at the time of service of the notice of formal proceedings and that discovery is available at the commission offices, and adds, as an alternative, a provision allowing a judge to request that the materials be sent to a specific address. The change in the title clarifies that the subsection covers the provision of documents and information by the commission to the judge. The change was unopposed.

Rule 129(b) (Submission of proposed findings of fact and conclusions of law)

The purpose of the change was to allow the examiner and the respondent judge more time after receipt of the hearing transcript in which to prepare and submit detailed proposed findings and conclusions to the masters without enlarging the time for the masters' submission of their report to the commission. The change was unopposed.

Rule 130(a) (Filing of opening briefs)

The change was purely technical – to conform the reference to the appropriate revised rule of the California Rules of Court.

//

Rule 133(b) Hearing Additional Evidence

The purpose of this change was to allow the commission, in its discretion, either to consider additional evidence itself or to refer the additional evidence to the masters. The existing rule may be read as requiring additional evidence to be referred to the masters. The change was unopposed.

Rule 134 Commission Vote

The purpose of the change was to correct a faulty reference to another rule and clarify that the affirmative vote of six members of the commission who were present at the hearing before the commission as provided in rule 132 are required for the imposition of discipline. The change was unopposed.

Policy Declaration 4.6 Disclosure of Information to Public Entities Upon Retirement or Resignation

With the amendment of Rule 102(k). this policy declaration was amended to clarify that release of information to a public entity concerning a judge who had resigned or retired requires the vote of a majority of the members of the commission.

Text of Rule and Policy Declaration Amendments

Rule 102(e):

(Disclosure to complainant) Upon completion of an investigation or proceeding, the commission shall disclose to the person complaining against the judge that the commission (1) has found no basis for action against the judge *or determined not to proceed further* ~~*against the*~~

~~judge~~ *in this matter*, (2) has taken an appropriate corrective action, the nature of which shall not be disclosed, or (3) has publicly admonished, censured, removed, or retired the judge, or has found the person unfit to serve as a subordinate judicial officer. The name of the judge shall not be used in any written communication to the complainant, unless formal proceedings have been instituted. Written communications to the complainant in which the judge's name is not used shall include the date of the complaint as a cross-reference.

Rule 102(h)

(Disclosure of records ~~of disciplinary action~~ to public entity upon request or consent of judge) If a judge or former judge requests or consents to release of commission records ~~of disciplinary action~~ to a public entity, the commission may release ~~those~~ *that* judge 's records.

[Adopted as interim rule 5/9/01 .]

Rule 102(k):

(Disclosure of information to public entities upon retirement or resignation) If a judge retires or resigns from judicial office after a complaint is filed with the commission, at the time of closing other proceeding the commission may, in the interest of justice or to maintain public confidence in the administration of justice, release information concerning the complaint, investigation and proceedings to the State Bar, to prosecutorial agencies, to state or federal authorities responsible for judicial

appointments, to regulatory agencies, or to the Chief Justice of the California Supreme Court, provided that the commission has completed commenced a preliminary investigation and the judge has had an opportunity to respond to the commission 's preliminary investigation letter.

Rule 109(d):

(Notification of disposition at the judge's request) Upon written request from a judge who is the subject of a complaint before the commission, the commission shall notify the judge in writing of the disposition of the complaint if:

(1) The judge's request to the commission specifically describes the underlying incident giving rise to the complaint;
(2) The pendency of the complaint has become generally known to the public; or
(3) The judge has received written notice of the complaint from someone who is not associated with the commission.

Rule 114 Private Admonishment Procedure:

A judge who receives a notice of intended private admonishment pursuant to rule 113 has the following options:

(a) (Acceptance of private admonishment) The judge may choose not to contest the intended private admonishment. If the judge does not contest the intended

private admonishment within 30 days after the mailing of a notice of intended private admonishment, the admonishment becomes effective.

(b) (Appearance before commission) The judge may, within 30 days of the mailing of a notice of intended private admonishment, file with the commission written objections to the intended private admonishment, waive the right to formal proceedings pursuant to rule 118, and demand an appearance before the commission to contest the intended private admonishment.
After the time set for the appearance before the commission, the commission may:

(1) Close the matter without disciplinary action;
(2) Close the matter with a confidential advisory letter; or
(3) Issue a private admonishment.

(c) (Formal proceedings) The judge may, within 30 days of the mailing of a notice of intended private admonishment, file with the commission a demand for formal proceedings pursuant to rule 118.

~~This rule applies to notices of intended private admonishment issued after the effective date of these rules.~~

Rule 116 Public Admonishment Procedure

A judge who receives a notice of intended public admonishment pursuant to rule 115 has the following options:

(a) (Acceptance of public admonishment) The judge may choose not to contest the intended public

admonishment. If the judge does not contest the intended public admonishment within 30 days after the mailing of a notice of intended public admonishment, the admonishment becomes effective.

(b) (Appearance before commission) The judge may, within 30 days of the mailing of a notice of intended public admonishment, file with the commission written objections to the intended public admonishment, waive the right to formal proceedings under rule 118, and demand an appearance before the commission to contest the intended public admonishment.

After the time set for the appearance before the commission, the commission may:

(1) Close the matter without disciplinary action;
(2) Close the matter with a confidential advisory letter;
(3) Issue a private admonishment; or
(4) Issue a public admonishment.

(c) (Formal proceedings) The judge may, within 30 days of the mailing of a notice of intended public admonishment, file with the commission a demand for formal proceedings pursuant to rule 118.

~~This rule applies to notices of intended private admonishment issued after the effective date of these rules.~~

Rule 119(b):

(Filing of answer) Within 20 days after service of the notice of formal proceedings the judge shall serve, in accordance with rule 119.5, and file with the commission an answer, which shall be verified and shall conform in

style to subdivision ~~(c) of Rule 15 of the Rules on Appeal~~ *(b) of rule 14 of the California Rules of Court*. The chairperson, the chairperson's designee or other member designated by the commission may grant an extension of time only upon timely request establishing good cause for an extension of time.

Rule 122(c):

(Initial discovery *provided* by trial counsel) At the time of service of the notice of formal proceedings, the judge shall be provided copies of all documents and other information specified in rule 122(e) which is not privileged and is in the possession of the commission. Such information shall be made available at the commission offices. *Alternatively, if a judge requests that the materials be sent to a specific address, the commission shall provide the judge with copies of said documents and information at that address.*

Rule 129(b):

(Submission of proposed findings of fact and conclusions of law) Within ~~20~~ *30* days after completion of the hearing transcript, the examiner and the respondent judge shall submit to the masters proposed findings of fact and conclusions of law, with citations to the transcript and exhibits, unless the masters waive the submission of such proposed findings and conclusions.

Rule 130(a):

(Filing of opening briefs) Within 15 days after the date

of mailing of the copy of the masters' report to the judge as reflected on the proof of service by mail, the examiner or the judge may file with the commission opening briefs which may consist of objections to the report of the special masters and points and authorities concerning the issues in the matter, including the issue of sanctions. Objections to the masters' report and all factual statements shall be specific and shall be supported by reference to the book and page number of the record. Briefs shall conform in style to ~~subdivision (c)~~ *(b)* of rule ~~15~~ *14* of the California Rules of Court, shall follow the length limitations set forth in subdivision ~~(c)~~ *(c)* of rule ~~15~~ *14* of the California Rules of Court, and, when filed by the examiner, a copy shall be sent by first-class mail to the judge.

Rule 133(b):

In any case in which masters have been appointed, the hearing of additional evidence shall may be before such masters or before the commission, and the proceedings therein shall be in conformance with the provisions of rules 121 to 130 inclusive.

Rule 134:

The commission may privately or publicly admonish, censure, remove or retire a judge, or find a person unfit to serve as a subordinate judicial officer. The affirmative vote of six members of the commission who have considered the record and report of the masters and who were present at any oral hearing as provided in rule 121 132 or, when the hearing was before the commission without masters, of six members of the commission who have considered the

record, and at least four of whom were present when the evidence was produced, is required for a private or public admonishment censure, removal or retirement of a judge, or a finding that a person is unfit to serve as a subordinate judicial officer, or for dismissal of the proceedings.

Policy Declaration 4.6:

Disclosure of Information to Public Entities Upon Retirement or Resignation

The release of information to a public entity following a judge's retirement or resignation, pursuant to rule 102(k), requires a vote of a majority of the commission members. ~~When information is disclosed to a public entity upon a judge's retirement or resignation pursuant to rule 102(k), t~~ The commission may, in its discretion, notify the judge that such disclosure is being made. Copies of any information being disclosed to the public entity may, in the commission's discretion, be made available to the judge who has retired or resigned.

[Approved 5/28/97.]

EXHIBIT C

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BRUCE VAN VOORHIS, JUDGE OF THE SUPERIOR COURT OF CONTRA COSTA COUNTY, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.	No. S116146 [Commission on Judicial Performance Inquiry No. 165] [PROPOSED] ORDER

GOOD CAUSE APPEARING, the court takes judicial notice of the following:

1. The court's records in *Platt v. Commission on Judicial Performance*, No. S 111125, review denied, February 19, 2003; *Couwenberg v. Commission on Judicial Performance*, No, S 102066, review denied, January 16, 2002; and *Ross v. Commission on Judicial Performance*, No. S071464, review denied, November 18, 1998.

2. The Biennial Review of the Rules of the Commission on Judicial Performance: Adoption of an Interim Change to a Rule of the Commission on Judicial Performance and Invitation to Comment on Proposed Amendments, dated October 18, 2002.

3. The Report of the Commission on Judicial Performance Regarding Adoption of Modifications to Rules and a Policy Declaration at its January 29, 2003 Meeting.

DATE: _____

_____
(Signature)

PROOF OF SERVICE

I, Kathleen A. Vota, the undersigned, am a citizen of the United Sates, over the age of 18 years, and not a party to or interested in the within action. My business address is 455 Golden Gate Avenue, Suite 14424, San Francisco, California 94102.

On July 7, 2003, I served the attached:

MOTION TO TAKE JUDICIAL NOTICE; POINTS AND AUTHORITIES; DECLARATION; PROPOSED ORDER [CRC Rule 22]

on all interested parties in said cause; by delivering a true copy as follows:

[ ] **(BY MAIL)** I placed the original or a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid. I deposited said envelope in the United States mail in the City and County of San Francisco, California. I am readily familiar with our office's practice for collection and processing of correspondence for mailing with the United States Postal Service, that this mailing will be deposited with the United States Postal Service on this date in the ordinary course of business and that I sealed and placed each envelope for collection and mailing on this date following ordinary business practices.

[ ] **(BY FEDERAL EXPRESS)** I sent the original or a true copy thereof enclosed in a sealed envelope to be delivered to Federal Express for overnight service to the office(s) of the addressee(s).

[X] **(BY HAND DELIVERY)** I placed the original or a true copy thereof enclosed in a sealed envelope to be hand-delivered on this same date by SILVER BULLET MESSENGER SERVICE to the office(s) of the addressee(s).

[ ] **(BY TELECOPIER)** In addition to service by mail as set forth above, the counsel by whose name an asterisk is affixed on the service list were also forwarded a copy of said document(s) by telecopier.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, Executed on July 7, 2003, at San Francisco, California.

/s/
Kathleen A. Vota

SUPREME COURT
FILED
JUL 28 2003
Frederick K. Ohirich Clerk
DEPUTY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRUCE VAN VOORHIS, JUDGE OF THE SUPERIOR COURT OF CONTRA COSTA COUNTY, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.	NO. S116146 Commission on Judicial Performance Inquiry No. 165

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THE HONORABLE BRUCE VAN VOORHIS' REPLY TO COMMISSION'S ANSWER TO PETITION FOR REVIEW OF DETERMINATION BY COMMISSION ON JUDICIAL PERFORMANCE [CRC RULE 935]

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BRUCE VAN VOORHIS, JUDGE OF THE SUPERIOR COURT OF CONTRA COSTA COUNTY, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent.	NO. S116146 Commission on Judicial Performance Inquiry No. 165

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I. INTRODUCTION

Removal of Judge Van Voorhis for demeanor misconduct is excessive, unprecedented and unnecessary to protect the public, enforce rigorous standards of judicial conduct or to maintain public confidence in the judiciary. The Commission has previously never removed a judge solely for demeanor misconduct and a review of the cases in which discipline was imposed for demeanor misconduct reveal that even multiple instances of demeanor misconduct, without more, are typically punishable by public admonishment. (See, Judge Alexander H. Williams, III, (Los Angeles County Superior Court, 1/22/97 and Judge Robert C. Coates (San Diego County Superior Court, 4/12/00 discussed in detail at pp. 18-20 of the Petition.)

As pointed out by Justice Vance W. Raye, in his dissent from the Commission's decision and order of removal, "what is necessary to protect the public from boorish behavior is different from what may be necessary to protect the public from corrupt decision making based on friendship, a persistent pattern of ex parte contacts and alteration of court records, persistent failures to perform duties in a diligent fashion, accepting gifts from litigants, abuse of the contempt power, prejudgment of cases, or interfering with the conduct of a Commission investigation." (Decision, Raye dissent, at p. 55-56.) None of the elements identified by Justice Raye are present in this matter.

In arriving at its decision to remove Judge Van Voorhis, the Commission improperly gave "little weight" to the mitigation evidence offered by Judge Van Voorhis. (Decision, at p. 48.) In particular, attorney Barry Burak was probably the most experienced lawyer to testify at the

hearing for either party. Mr. Burak has been a licensed criminal defense attorney for over thirty years. (RT 529:4-11.) He maintains an office in Contra Costa County. (RT 529:12-14.) Mr. Burak has conducted between 300 and 400 jury trials. (RT 530:2.) He has tried approximately a dozen jury trials, one or two court trials and probably appeared over hundred times in Judge Van Voorhis courtroom. (RT 530:6-10.) Mr. Burak is present in Judge Van Voorhis courtroom on a weekly basis. (RT 530:11-13.) He had more experience with Judge Van Voorhis than any other attorney that testified at the hearing.

Mr. Burak's opinion is that Judge Van Voorhis is one of the hardest working, brightest and efficient judges on the bench. (RT 530:14-20.) The demeanor problems that the Commission contends are so likely to reoccur (Answer, at pp. 45-46) are not at all consistent with the experience of Mr. Burak who, until the order of removal, was present in Judge Van Voorhis' courtroom on a weekly basis.

The Commission ignored Mr. Burak's testimony and instead speculated that Judge Van Voorhis will continue to violate the Code of Judicial Ethics if he is allowed to remain on the bench. (Decision and Order, at p. 50.) This determination is manifestly unfair as the imposition of discipline should rest upon proven misconduct and not guesswork or speculation.

While it is true that Judge Van Voorhis was disciplined in 1992 for demeanor misconduct, there was no evidence that Judge Van Voorhis has engaged in a pattern or practice of demeanor misconduct since that time. In fact, approximately eight years elapsed between the prior discipline imposed and the misconduct found by the masters in this instant matter. Judge Van Voorhis has been working to control his demeanor and was successful for

approximately eight years. Contrary to the decision of the Commission, this is not evidence that Judge Van Voorhis is unwilling or unable to reform. This is evidence that Judge Van Voorhis has worked to project an appropriate demeanor, but was unsuccessful during late 1999 and 2000.

Judge Van Voorhis remains willing and able to offer evidence that he has successfully presided over a busy calendar and has handled things better over the last eighteen months before his removal. The Commission's decision should be reversed and this matter should be remanded so that Judge Van Voorhis can present this relevant and important dispositional evidence.

Finally, the Commission acted in excess of it jurisdiction in removing Judge Van Voorhis due to its failure to comply with Commission Rule 134. This is a non-waivable jurisdictional error which invalidates the decision and order removing Judge Van Voorhis.

II. LEGAL ARGUMENT

A. THE COMMISSION DID NOT LAWFULLY REMOVE JUDGE VAN VOORHIS.

1. The Commission's Interpretation of Rule 134 Is Irrelevant Because Rule 134 Is Unambiguous.

The Commission begins the analysis of former Rule 134 by acknowledging that the "same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies." (Answer, at p. 7.) The Commission then argues that it has always interpreted Rule 134 to require the members attendance at the Rule 132 hearing, but not the Rule 121 hearing and that the reference

to Rule 121 in former Rule 134 was "inadvertent and in error." (Answer, at p. 6.)

The Commission's argument is without merit. Its interpretation of Rule 134 and the legislative history of Rule 134 are not a relevant consideration here because Rule 134 is not ambiguous. Former Rule 134 plainly references Rule 121 (and not Rule 132) in the text of the rule. Regardless of how the Commission interprets Rule 134, there is only one reasonable construction of the rule.

Because Rule 134 is unambiguous there is no need to consider legislative history to interpret the rule.[1] As has been frequently said: "In construing the terms of a statute [the court] resort[s] to the legislative history of the measure only if its terms are ambiguous." (Title Ins. & Trust Co. v. County of Riverside (1989) 48 Cal.3d 84, 96.) An ambiguity arises only if ". . . there [is] more than one construction in issue which is semantically permissible, i.e., more than one usage which makes sense of the statutory language given the context and applicable rules of usage." (County of Sutter v. Board of Administration (1989) 215 Cal.App.3d 1288, 1295.) Here, multiple constructions of Rule 134 are not possible.

To consider extrinsic evidence as urged by the Commission in interpreting Rule 134 would violate the principle that, when statutory language is clear and unambiguous, there is no need for construction, and courts should not indulge in it." (Solberg v. Superior Court (1977) 19 Cal.3d 182, 198.) This rule is deeply rooted in

---

[1] This is not so much a question of interpretation as it is one of the Commission asking this court to redraft former rule 134 in order to substitute Rule 132 in place of Rule 121.

American jurisprudence. (Sturges v. Crowninshield (1819) 17 U.S. 122, 202.)

> "In any case involving statutory interpretation, our fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] We begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.]" (People v. Murphy (2001) 25 Cal.4th 136, 142.) Where statutory language is clear and unambiguous--i.e., it has only one reasonable construction -- judicial construction is generally unnecessary. (Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 775.)

The Commission's argument is very similar to an argument that was advanced and rejected in Planned Parenthood Affiliates v. Swoap (1985) 173 Cal.App.3d 1187.) The facts of Planned Parenthood arose from a clerical error in the California State Budget. In 1985-1986, the California State Budget originally contained a section (section 33.35), which restricted the use of family planning funds for organizations providing abortion-related services. The Legislature, by a two-thirds majority, voted to delete the provision, but because of a clerical error, the deletion was never made. The Governor, although requested by the Speaker of the Assembly to correct the bill, signed it, stating that he was opposed to use of public funds for such services. Petitioners, a coalition of family planning organizations and state officers, sought mandamus to compel respondent Secretary of Health and Welfare to

refrain from enforcing the section. The Court held that the petition could not be granted on this showing.

The Court clarified that the issue in Planned Parenthood was not one of interpretation to carry out legislative intent. The words of section 33.35 were clear, so extrinsic evidence simply could not be used to nullify the provision as enacted. (Planned Parenthood, 173 Cal.App.3d at p. 1193.) The Court held that the appropriate remedy for mistakes in budget bills is a "cleanup bill" to correct the errors. (Id., at p. 1195; See also, Ceridian Corp. v. Franchise Tax Board (2000) 85 Cal.App.4th 875, 889; Sacramento v. Public Employees' Retirement System (1994) 22 Cal.App.4th 786, 793.)

There is a sound justification for not relying upon extrinsic evidence to interpret an unambiguous statute: "If the meaning of a statute can be declared without the support of a statutory text, the law is not made "by" the statute, it is made by the courts in violation of the Constitution. This does not mean that legislative history may not be brought to bear upon the construction of the statutory text. Its utility, however, is confined to that task. The significance to be accorded extrinsic evidence of legislative intention (or purpose) depends upon its capacity to resolve ambiguities in statutory language . . .." (In-Home Supportive Services v. Worker's Comp Appeals Bd. (1984) 152 Cal.App.3d 720, 739.)

Rule 134 is unambiguous and the Commission's argument that its interpretation of the statute should control is without merit. Furthermore, the fact that the Commission previously removed three other judges in contravention of Rule 134 does not make the removal of Judge Van Voorhis lawful. It merely means that three

other judges before Judge Van Voorhis have also been unlawful removed by the Commission.[2]

2. The Absence Of The Commission Members From The Rule 121 Hearing Is A Jurisdictional Error That Cannot Be Waived.

The Commission contends that Judge Van Voorhis waived his objection regarding non-compliance with Rule 134 by not raising it first with the Commission. (Answer, at p. 12.) However, former Rule 134 is a jurisdictional rule and non-compliance cannot be waived. A noncurable defect of substance where the question is one of law, such as lack of jurisdiction, is not waivable. (See, Twine v. Compton Supermarket (1986) 179 Cal.App.3d 514, 518 [questions of jurisdiction may be raised for first time on appeal.]) Thus, contrary to the Commission's argument the issue of whether the Commission acted in excess of its jurisdiction in violating Rule 134 is not waivable.
As stated by this court in Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, at p. 291:

> "The concept of jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made

---

[2] Judge Platt, Judge Couwenberg and Judge Ross were all apparently removed in violation of the clear terms of former Rule 134. (See, Answer at p. 7)

> mandatory and jurisdictional. Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari. And, as a practical matter, accuracy in definition is neither common nor necessary."

In Rodman v. Superior Court (1939) 13 Cal.2d 262, this court held that "it seems well settled ... that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction." (Rodman, at p. 269.) Here, the Commission acted in excess of its jurisdiction because none of the Commission members who voted to remove Judge Van Voorhis attended the Rule 121 hearing as required by former Rule 134.

3. The Commission's Use Of Amended Rule 134 In Place Of Former Rule 134 Was An Improper Retroactive Application Of The Rule.

In general, the legislature may cure irregularities or omissions to comply with provisions of a statute which could have been omitted in the first instance. (Miller v. McKenna (1944) 23 Cal.2d 774, 782.) However, the Legislature cannot cure defects which are jurisdictional. Among the jurisdictional requisites are sufficient notice and opportunity for hearing to constitute compliance with due process. (Ibid.)

As discussed above, the Commission acted in excess of its jurisdiction in not attending the Rule 121 hearing and then voting on the disposition of Judge Van Voorhis. While the precise date of the Commission vote is not clear, the Commission members in fact retired to deliberate on December 4th, 2002 and the amendment to Rule 134 did not occur until January 29th, 2003. Thus, it is extremely unlikely that amended Rule 134 had been enacted at the time of the Commission vote in this matter.

Even if amended Rule 134 was in effect at the time of the vote, which is doubtful, the amendment is more than just a procedural change. The Commission's non-compliance with former Rule 134 was a jurisdictional defect that cannot be cured by subsequent amendment. Attendance at the Rule 121 hearing was a jurisdictional requirement under former Rule 134. The Commission acted in excess of its jurisdiction in failing to attend the hearing and that defect cannot now be cured by retroactive amendment to the rule.

There were real consequences to Judge Van Voorhis resulting from the Commission's failure to attend the Rule 121 hearing. In particular, had the Commission attended the Rule 121 hearing, then the members could have personally observed the favorable testimony of Mr. Gomes, Mr. Burak and Mr. Larkin, among others. This testimony was unreasonably rejected by the masters without an evidentiary basis for doing so. Had the Commission members been present at the hearing, then they could have observed this testimony firsthand.

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B. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE FINDING IN COUNT ONE THAT JUDGE VAN VOORHIS GAVE THE APPEARANCE OF MAKING AN INTENTIONALLY INCORRECT EVIDENTIARY RULING.

The Commission acknowledges that Judge Van Voorhis did not deliberately make an incorrect ruling. (Decision and Order of Removal, p. 3.) Rather, the Commission found that Judge Van Voorhis gave the appearance of making an intentionally incorrect evidentiary ruling to see how a deputy district attorney would handle adversity. (Decision and Order of Removal, at p. 3.) What is troubling about this finding is that the Commission did not consider all of the facts surrounding Judge Van Voorhis' remarks to Ms. Brock in reaching this determination. Without considering all of the facts it is not possible to make a fair and objective determination of the appearance that would arise from Judge Van Voorhis' remarks to Ms. Brock.

There is a factual dispute over the precise words used by Judge Van Voorhis when he was speaking with Ms. Brock after trial. However, there is no dispute that Judge Van Voorhis was in fact asked to provide constructive criticism of Ms. Brock's performance after the trial had concluded. (RT 70:4-16.) Judge Van Voorhis was not providing unsolicited advice, rather he was responding to a request, after trial, to help Ms. Brock become a better trial lawyer.

Mr. Gomes' testimony is particularly relevant in this regard and should have been considered by the Commission. Mr. Gomes testified that Ms. Brock was visibly upset with the adverse ruling she received during

trial and that she did not behave appropriately. (RT 466:10-18; 468:5-17.) Contrary to the Commission's argument, Mr. Gomes' testimony was not undermined by the transcript of the proceedings because the two-dimensional record does not reflect whether Ms. Brock became visibly upset or whether she behaved appropriately after the ruling was made. (Answer, at p. 16.) Mr. Gomes testified that Ms. Brock did become upset and there was no evidence to the contrary. The record does not reflect otherwise.

Mr. Gomes' testimony is important because it places Judge Van Voorhis' remark to Ms. Brock in context. Where the imposition of discipline is based upon the appearance that arises from conduct, then the totality of the circumstances must be considered to place that conduct in a fair light. Selectively excluding relevant facts can make otherwise appropriate conduct appear to be wrongful. For example, even assuming for the sake of argument that Judge Van Voorhis' ruling was error, Ms. Brock nonetheless should not become visibly upset with the ruling or act inappropriately. An objective observer viewing the entire trial would have seen Ms. Brock become upset during in limine motions and, after the verdict, would have seen either Ms. Brock or Ms. Douglas ask Judge Van Voorhis for advice about becoming a better lawyer. In response, the observer would have heard Judge Van Voorhis' advice to Ms. Brock about not allowing adverse rulings to upset her or throw her off. This is an entirely reasonable series of events that should not result in the imposition of discipline.

The Code of Judicial Ethics provides, among other things, that "[w]hether disciplinary action is appropriate, and the degree of discipline to be imposed, requires a

reasoned application of the text and consideration of such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or the judicial system. (Cal. Code of Judicial Ethics, Preamble.)

Imposing discipline under these facts does not set a very useful precedent to guide judicial behavior. Here, Judge Van Voorhis was asked to provide advise to a young lawyer who became upset with an adverse evidentiary ruling. The advice was either misinterpreted or the judge spoke inartfully. Either way, the weight of the record is that the judge was attempting to provide advice and constructive criticism to a young attorney at her request or at her supervisor's request. Imposing punishment upon a judge because a young lawyer misinterprets constructive criticism after asking a judge for advice is unwarranted and will have the unfortunate effect of encouraging judges not to provide constructive criticism to young attorneys.

C. THERE WAS NOT CLEAR AND CONVINCING EVIDENCE OF BAD-FAITH TO SUPPORT THE WILLFUL MISCONDUCT FINDING IN COUNT TWO (A.2)

A finding of willful misconduct requires "bad-faith." Bad-faith is "quintessentially a concept of specific intent, requiring consciousness of purpose as an antecedent to a judge's acting maliciously or corruptly." (Spruance v. Commission on Judicial Qualifications (1975) 13 Cal.3d 778, 796.) The Commission's finding of bad-faith here ignores the specific intent requirement. Even if Judge Van Voorhis became embroiled, it does not follow that he entertained the intent to deliberately ridicule Ms.

McMurray or prejudice her case when the admissibility of the HGN test was discussed.

The Commission cites Cannon v. Commission on Judicial Qualifications (1975) 14 Cal.3d 678 and Kennick v. Commission on Judicial Performance (1990) 50 Cal.3d 297 in support of its finding that Judge Van Voorhis committed willful misconduct in this count. Both of these cases are distinguishable.

Cannon v. Commission on Judicial Qualifications (1975) 14 Cal.3d 678 involved a wide variety of corrupt misconduct and does not stand for the proposition that a judge becoming embroiled during an argument over evidence has committed willful misconduct. In particular, this court summarized Judge Cannon's conduct as follows:

> "We conclude that petitioner has engaged in twenty-one acts constituting 'willful misconduct in office' and in eight other acts constituting 'conduct prejudicial to the administration of justice that brings the judicial office into disrepute.' [Footnote] Although some of the specific acts charged and found may overlap as arising out of a particular course of conduct, the totality of petitioner's judicial misconduct nevertheless presents a compelling case against her. We deem to be particularly egregious the bad faith and maliciousness with which petitioner arbitrarily ordered the immediate incarcerations of deputy public defenders who displeased her, and denied the effective right of counsel to their clients who were required to defend against charges in on-going criminal proceedings with substituted counsel who were afforded no reasonable opportunity to prepare. As we find

nothing to excuse or mitigate Judge Cannon's conduct we adopt the Commission's recommendation and order that she be removed from office." (Id., at p. 681.)

It is telling that demeanor misconduct was not included in the summary of Judge Cannon's conduct justifying her removal. Moreover, while Judge Cannon was disciplined for demeanor misconduct, that demeanor misconduct was coupled with other misconduct. Even in the case of Deputy Public Defender Fleishman (See, Answer, at p. 23), Judge Cannon was found to have inappropriately relieved defense counsel without first obtaining consent. (Cannon, at p. 691 at fn 11.) This was part of the basis for a finding of willful misconduct against Judge Cannon in the Fleishman incident. The Fleishman incident involved more than just demeanor misconduct. In contrast to Judge Van Voorhis, Judge Cannon's misconduct was more than just embroilment.

Kennick v. Commission on Judicial Performance (1990) 50 Cal.3d 297, cited by the Commission, also does not support a finding of willful misconduct in this matter. The facts of Kennick are instructive: After a preliminary hearing in a robbery case at which Judge Kennick sharply curtailed direct examination conducted by Deputy District Attorney Barbara Channell, Judge Kennick called Channell into chambers and, without apparent cause, angrily accused her of creating a security hazard in the courtroom. Judge Kennick raised his voice and pointed his finger at Channell. There was testimony that Judge Kennick yelled at Channell for three to five minutes and that his yelling was loud enough to be heard in the courtroom. Later, Judge Kennick was observed laughing about the incident and bragging

about how he had made Channell run from his courtroom. (Id., at p. 324.) The masters found these allegations to be true and further found that Judge Kennick jokingly referred to the incident later in the day, which was evidence he had acted in bad faith. Both the masters and the commission concluded that petitioner's behavior constituted willful misconduct. (Id., at p. 323.)

Kennick is distinguishable from this matter because there was clear and convincing evidence that Judge Kennick intentionally engaged in abusive treatment of counsel, specifically, Judge Kennick was observed laughing and bragging about his conduct after it occurred. Thus, there was evidence of Judge Kennick's specific intent to engage in bad-faith conduct. Here, there was testimony from attorney David Larkin that Judge Van Voorhis was not harsh, sarcastic or discourteous to Ms. McMurray. (RT 502:22-25; 509:12-13.) Unlike Judge Kennick, Judge Van Voorhis never raised his voice during the discussion. (RT 502:18-21.) Unlike Judge Kennick, there is no evidence that Judge Van Voorhis ever joked or bragged about the incident after it occurred.

There was not clear and convincing evidence that Judge Van Voorhis acted in bad-faith. The finding of willful misconduct was not supported by the evidence and must be reversed.

D. THERE WAS NOT CLEAR AND CONVINCING EVIDENCE OF THE APPEARANCE OF ETHNIC BIAS IN COUNT TWO (A.3)

It is undisputed that Mr. Alvear has an accent. Regardless of whether Mr. Alvear is difficult to understand or not, every witness who testified at the hearing agreed that Mr. Alvear has an accent. In fact, Susan Hutcher

testified (by deposition) that she thought that Mr. Alvear's accent was charming. (Exh. 8, p. 9:2-15.) There is no evidence that Judge Van Voorhis was trying to belittle, demean or make any type of joke about Mr. Alvear's accent.

Contrary to the Commission's Answer at p. 28, the masters did in fact find only that the objective public "could" have the perception of ethnic bias. (Masters' findings, at p. 27.) The Commission then found that Judge Van Voorhis' comment actually "gave the appearance of bias or prejudice based on national origin in violation of cannon 3B(5)." (Decision and Order, at p. 14.) There is a significant difference between the two findings. The masters found only the possibility of the perception of ethnic bias. The Commission, however, found that Judge Van Voorhis' remarks to Mr. Alvear actually gave the appearance of ethnic bias. The evidence does not support such a finding.

The masters and the Commission both cited Gonzalez v. Commission on Judicial Performance (1983) 33 Cal.3d 359 in support of the finding that Judge Van Voorhis' remarks gave rise to the appearance of ethnic bias. While the Gonzalez case does involve an allegation of ethnic bias, it is respectfully submitted that this matter has nothing factually in common with Gonzalez. In Gonzalez, Judge Gonzalez, both in open court and in private communications with persons associated with the court, improperly engaged in personal verbal attacks, indulged in indelicate sexual and ethnic remarks, and made comments that cast doubt on his appreciation of the nature and importance of his judicial duties. By any standard, Judge Gonzalez' behavior was far more egregious than what occurred here. For example, "on pronouncing judgment on

a male of Mexican extraction on a charge of beating his wife, [Judge Gonzalez] stated that although such behavior might be tolerated in Africa or Mexico, it would not be tolerated in America. [Citations.] During jury voir dire in a criminal case he questioned a Japanese venireman about inflation and then commented that he did not know why he was speaking to a Japanese juror about inflation, because "what do fishheads and rice cost?" [Citations.] During another jury voir dire in a criminal case [Judge Gonzalez] asked a black woman on the panel who had said she worked as a grocery clerk if she knew the price of watermelon. [Citations.] In a colleague's chambers [Judge Gonzalez] responded to the news that a black district attorney's wife had had a miscarriage by saying, in essence, "Oh good, one less minority." [Citations.] Finally, at a Christmas party attended by most of the court personnel [Judge Gonzalez] asked a female Jewish district attorney whether "with all the inbreeding your people do, aren't you afraid that they will produce a race of idiots," or words to that effect. [Citations.]" (Gonzalez, at p. 376.)

Judge Van Voorhis has acknowledged that his comment to Mr. Alvear could be viewed as insensitive. (Petition, at p. 38.) Judge Van Voorhis, however, takes great exception to the Commission's finding that his brief statement to Mr. Alvear was clear and convincing evidence of the appearance of ethnic bias. Even under the most stringent politically correct analysis, this finding was unjustified and not supported by the evidence.

1. Judicial Conduct Is Evaluated Under An Objective Standard.

Contrary to the Commission's argument, Mr. Alvear's subjective feelings are not a relevant consideration in determining the severity of the judge's misconduct.

(Answer, at p. 28.) This is not a tort case where Mr. Alvear would be entitled to an award of damages based upon the level of his emotional upset. Judicial conduct is evaluated under an objective standard. (Geiler v. Commission (1973) 10 Cal:3d 270, 277.) If, according to the Commission, the measure of the severity of misconduct depends upon the victim's reaction, then judicial conduct is no longer being evaluated under an objective standard. If the severity of the judge's misconduct depends upon the particular victim's reaction, then the Commission is now utilizing subjective considerations to determine the severity of misconduct. The pertinent consideration is how an objectively reasonable person would react to the conduct.

It is respectfully submitted that Judge Van Voorhis' remarks to Mr. Alvear are not misconduct under an objective standard.

E. THE FINDINGS OF WILLFUL MISCONDUCT IN COUNT TWO (A.4, A.5, & A.6) ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The findings of willful misconduct in counts two A.4, A.5 & A.6 were not supported by clear and convincing evidence. Becoming spontaneously angry with an attorney during trial is not equivalent to the specific intent required for bad-faith conduct as contemplated in the Spruance case. Even if Judge Van Voorhis' comments were not appropriate, this does not mean the comments were made in bad-faith. There must be clear and convincing evidence that the purpose of those remarks was to publicly embarrass the attorney. Poor demeanor or an eruption of temper, by itself, does not constitute willful misconduct if the judge continues to pursue the faithful discharge of judicial duties.

As an example, in count two A.4, it would have been better for Judge Van Voorhis to have excused the jury in hindsight, however there is no legal authority holding that the jury must be excused. The weight of the evidence was that not excusing the jury was an oversight as a result of becoming embroiled. Instead, the Commission found a corrupt purpose in not excusing the jury - to vent anger or frustration. The Commission relied upon the repetitive pattern of poor demeanor to prove the intentional bad-faith, which is speculation.

Similarly, in count two (A.5 & A.6), a spontaneous venting of anger or frustration cannot be bad-faith because it would essentially make any violation of Cannon 3B(4) willful misconduct. The Commission's finding of willful misconduct in these counts must be reversed.[3]

F. REMOVAL OF JUDGE VAN VOORHIS IS NOT SUPPORTED BY EXISTING PRECEDENT.

At the hearing before the Commission on December 4th, 2002, Commission counsel conceded, in response to a question from then Commission member Michael Kahn, that there was no existing precedent which supported removing a judge for demeanor misconduct. Curiously, the Commission now cites five cases as precedent supporting

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[3] The finding of willful misconduct in count two (A.6) was also based upon the Special Masters' finding that Ms. Brock was required the make a confession to the jury. There is no evidence of any such confession to the jury in the record. Again, in hindsight, it probably would have been better to excuse the jury before discussing the evidence. However, nothing in the trial transcript indicates that Judge Van Voorhis ordered Ms. Brock to directly address the jury or make any confession to the jury.

Judge Van Voorhis removal for demeanor misconduct. (See, Answer at pp. 50-51.)

Commission counsel's statement on December 4th, 2002, was the more accurate representation. While the five cases cited by the Commission now do vaguely involve demeanor misconduct, each of these cases also implicates conduct far beyond demeanor misconduct, such as corrupt decision-making based upon friendship, a persistent pattern of ex parte contacts, alteration of court records, accepting gifts from litigants, abuse of the contempt power and interfering with the conduct of a commission investigation. (See, e.g., Raye dissent in Decision and Order at pp. 55-58 summarizing prior cases involving removal and censure.)

None of those facts are present in this case.

III. CONCLUSION

It is respectfully submitted that removal is not justified and is an unreasonably harsh and inappropriate sanction in this matter. The Commission's Decision and Order of Removal must be reversed and this matter remanded to the Commission for an appropriate disposition.

Dated: July 28, 2003

MURPHY, PEARSON, BRADLEY & FEENEY

By /s/_____
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HBW.10182192

CERTIFICATE OF WORD COUNT
(California Rule of Court Rule 14.1(c)(1))

The text of this brief consists of 5700 words, including footnotes, as counted by Microsoft Word 2000 which was used to generate this brief.

Dated: July 28, 2003

MURPHY, PEARSON, BRADLEY & FEENEY

By /s/_____
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HBW.10173858.doc

CERTIFICATE OF SERVICE

I, Debbie A. Smith, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 88 Kearny Street, 10th Floor, San Francisco, California 94108-5530.

On July 28, 2003, I served the following document on the parties in the within action: **THE HONORABLE BRUCE VAN VOORHIS' REPLY TO THE COMMISSION ON JUDICIAL PERFORMANCE'S ANSWER TO PETITION FOR REVIEW OF DETERMINATION BY COMMISSION ON JUDICIAL PERFORMANCE [CRC RULE 935]**

BY HAND: The above-described document will be placed in a sealed envelope which will be hand-delivered on this same date by SPINCYCLE LEGAL SERVICES, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on July 28, 2003.

By:_____
Debbie A. Smith